IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 82-5096

KENNETH DARCELL QUINCE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

Whether the refusal of the Supreme Court of Florida in a capital appeal to reweigh and independently evaluate the evidence adduced to establish the aggravating and mitigating circumstances as it is required to do under Florida's death penalty sentencing scheme denies a death-sentenced defendant due process of law and subjects him to cruel and unusual punishment?

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OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is reported as Quince v. State. 414 So.2d 185 (Fla. 1982). It is reproduced in the appendix as item 1. (A1-5)

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on March 4, 1982. (A1-5) Petitioner filed a motion for rehearing (A6-11) which was denied on May 27, 1982. (A12) Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28 United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VIII to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. Amendment XIV, Section 1 to the Constitution of the United States, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section 921.141, Florida Statutes (1979) which is set forth in the Appendix as item 7. (A19-20)

STATEMENT OF THE CASE

On January 17, 1980, a Volusia County, Florida grand jury returned an indictment charging the Petitioner with first degree murder of Francis Bowdoin, sexual battery of Frances Bowdoin, and burglary of an occupied dwelling with an assault therein of the residence of Frances Bowdoin, stemming from an incident on December 28, 1979. (R1) (A13) Following mental examinations which, according to the psychiatrists, revealed that Quince was legally sane at the time of the offense and was competent to stand trial, the petitioner entered pleas of guilty to Count I (first degree felony murder coommitted during the course of the sexual battery) and Count III (burglary). (R4,5-8,48-56;SR5-17) Count II, the Sexual battery charge, was dismissed by the court, upon motion by the defense, because it was the underlying felony of the felony murder. (R11-12,29;SR18-19) Pursuant to the plea negotiations, the petitioner waived a sentencing jury, the court to hold a hearing for aggravating and mitigating evidence to be presented to the judge alone. (SR6-8) (A2)

A penalty phase hearing before the judge alone was held on October 20, 1980. (T1-208) On October 21, 1981, based upon the evidence and arguments presented at the hearing and based upon the pre-sentence investigation, the trial court imposed a sentence of death upon Kenneth Quince. (R30;T210-212) (A14-15) In its findings of fact, the court found as aggravating circumstances: (d) the murder was committed while the defendant was committing rape; (f) the murder was committed for pecuniary gain; and (h) the murder was especially heinous, atrocious, or cruel because it involved a strangulation during a burglary and sexual battery and because "while the deceased was lying on the floor, presumably dead or unconscious, the Defendant stepped on her stomach." (R18-19) (A2,16-17) Although giving it little weight, the trial court found the existence of mitigating factor (f), the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R19-20) (A2,17-18) The trial

court rejected (a) lack of a significant prior criminal history based upon the defendant's juvenile charges (the most recent of which was five years old), and (g) the defendant's age of twenty years old as mitigating factors. (R19-20,25) (A2,17-18)

The Supreme Court of Florida affirmed the petitioner's convictions and sentence in the judgment now before this Court. (A1-5)

On December 30, 1979, Detective Larry Lewis was dispatched to a house in Daytona Beach regarding a suspicious death. (T11) Upon arriving at the scene, he found the body of Frances Bowdoin, age 82, lying on the floor of her bedroom. (R12-13) (A2) The detective observed dried blood coming from the deceased's nose, burises on her forearm, a bruise under her ear, and a small abrasion on her pelvic area. (T14,15,24-26) (A2)

The medical examiner later determined that the cause of death was suffocation by strangulation. (T90,92) (A2) Dr. Botting also noted two lacerations on the victim's head which could have been caused either by a sharp-edged instrument or by the sharp edge of furniture on which she may have fallen. (T80-81) These lacerations would have been sufficient to cause unconsciousness. (T91) Because of a bruise to the vaginal area of the victim, the medical examiner concluded that the sexual assault occurred prior to death, but the doctor could not opine whether the victim was conscious or unconscious at the time. (T91,92) (A2) At the scene, the detective had obtained several latent fingerprints from the window area which he had concluded was the point of entry of the intruder. (T27) The detective later compared the latent prints with those of the suspect, Kenneth Quince. (T28,35) Detective Lewis made a positive comparison. (T28,35)

On the basis of this fingerprint identification, Detective Lewis arrested Quince at his home, approximately two blocks from the Bowdoin residence. (T35-36) (A2) Quince was taken to the police headquarters, where he signed a waiver of his

constitutional rights. (T36) After the officer explained to Quince that the arrest was in reference to a burglary, the petitioner denied knowledge of the incident. (T36-37) (A2)

The detective asked Quince if he knew where the house in question was, the defendant responding that he had cut the yard for the lady five or six years ago. (T42) After repeated questioning as to whether the petitioner had been there more recently, Quince finally told the detective that he had been at the house. (T43) (A2) Quince told Detective Lewis that he had burglarized the house, believing no one to be home. (T44) While inside looking for valuables, Quince told the detective, Frances Bowdoin came to the bedroom door and the two spotted each other. (T44) The victim closed her bedroom door and Quince, after trying unsuccessfully a couple of times, managed to force the door open. (T44) The force of the opening door knocked Ms. Bowdoin to the floor. (T44) She stood back up and started to scream, whereupon the petitioner, trying to quiet her, grabbed her by the throat, shook her for a while, and pushed her to the floor. (T44) The petitioner continued to look for valuables, taking a tape player, a radio, and a ring which he later pawned at three pawn shops. (T44,51) Detective Lewis later recovered these items at the pawn shops. (T45) When the petitioner was running through the house to leave, he stepped on the deceased's stomach. (T51)

Detective Lewis questioned the petitioner concerning a sexual assault which the police suspected had occurred. (T45-46) Quince denied that any sexual battery had occurred, but, a month later, after the detective confronted him with laboratory test results, the petitioner admitted with some embarrassment to the sexual battery, without giving any further details. (T51-53,57-58) (A2) (Quince later told psychiatrists that, after pushing the deceased to the floor, and after she was unconscious, her nightgown rode up around her waist, and, becoming sexually excited, he raped her.) (R54)

Dr. Ann McMillan, a psychologist who had been appointed by the court to examine Quince specifically for the purpose of determining whether any mental mitigating factors were present, testified that Quince suffered from borderline mental retardation and had severe specific learning disabilities and impairment. (R57;T144) Dr. McMillan told the court that the petitioner had a significantly lower mental age and would act more like an eleven year old than an adult. (T147) (A2) Quince, who had a jugment disability and was unable to perceive the consequences of his actions, merely reacted to the circumstances of the instant situation, rather than acting through step-by-step planning. (T144,147-149) The homicide and sexual battery, therefore, were committed by a defendant whose capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (T144-147) (A2)

The other psychiatrists, all but one of whom were appointed solely to determine Quince's competency to stand trial and sanity, agreed that Quince was of below normal intelligence, in the "dull-normal" range, or borderline mentally retarded. (R54;T111,128-129,157-158) (A2) not having performed any intelligence or personality tests on the defendant, they opined that the mitigating factor of impaired capacity was not present. (T113-115,158,164-165) Dr. Stern, however, stated that Quince "was not functioning with all his marbles" and Quince's borderline intelligence, could in itself, constitute somewhat of a mental impairment. (T158,162-163) Dr. Rossario's report indicates that the petitioner's judgment is "markedly impaired." (R55)

During the penalty phase hearing the prosecutor elicited from Detective Lewis, over defense counsel's initial objection, that, in Lewis' opinion, the petitioner exhibited no remorse. (T56) (A4) Detective Lewis did admit, however, that he had never asked Quince how he felt about the incident. (T57)

Furthermore, in the pre-sentence investigation, Quince was quoted as saying, "I do have feelings about what happened but it's too late now to say anything more." (R24)

Also during the penalty phase hearing, the trial court initiated questioning about the prospects of rehabilitation for the defendant. (R148) (A4) Dr. McMillan stated that Quince, due to his mental condition, would require lifelong supervision. (T148) Dr. Stern testified for the defense that Quince could be rehabilitated. (T165)

The pre-sentence investigation revealed that the petitioner was part of a very large family, having seven living brothers and sisters. (R25) Quince lived with his mother, a custodian at a school, and four sisters. (R26) Quince's father died in an automobile accident when Quince was five years old. (R25) Quince attended school through the tenth grade, receiving very poor grades. (R26,54;SR10) The petitioner admitted in the pre-sentence investigation and to the psychiatrists that he drank and smoked marijuana heavily, including the day of the offense. (R26,54,55) Quince began drinking when he was thirteen years old and began the use of drugs at age fifteen. (R54,56)

The trial court did not consider any of the above-stated background of the petitioner as non-statutory mitigating factors. (R19-20) The state had argued at the hearing, in an objection to defense examination of a psychiatrist, that the questions were not what the statute requires. (T160,162) The court, in ruling on the objection, told defense counsel to focus on the statutory aggravating and mitigating factors. (T163)

On appeal to the Supreme Court of Florida, the petitioner asked the Court to review and reweigh the evidence in mitigation (especially concerning the mitigating factor of the petitioner's impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law), arguing that the trial judge did not give adequate weight to the mitigating evidence. The Florida Supreme Court, however,

declined to review or reweigh the evidence, holding that this was not its function on appeal from a capital sentence:

> Rather, this is a case in which the appellant disagrees with the weight that the trial judge accorded the mitigating factor. But mere disagreement with the force to be given such evidence is an insufficient basis for challenging a sentence. See Hargrave v. State, 336 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979).
>
> > Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.
>
> Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981), cert denied. ___ U.S. ___, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981) (footnote omitted). (A3) (emphasis added)

In the motion for rehearing, the petitioner asked the court to reconsider its position on reviewing and reweighing evidence adduced in support of the mitigating factors. (A8) The petitioner contended that, by this recently-announced refusal to reevaluate mitigating evidence, the Florida Supreme Court had broken the promise which it had made in earlier cases to independently review and reweigh the evidence, which promise had been specifically relied upon by the United States Supreme Court in upholding the constitutionality of Florida's death sentence in Proffitt v. Florida, 428 U.S. 242, 252-253 (1976). (A8) The Florida Supreme Court's change from its independent sentence

review responsibilitites, the petitioner argued, renders Florida's death penalty unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution since the discretion of juries and judges is no longer being controlled and channeled by the appellate process, and the penalty is therefore being imposed and affirmed in an arbitrary and capricious manner. (A8) The Florida Supreme Court denied the motion for rehearing. (A12)

REASONS FOR GRANTING THE WRIT

THE REFUSAL OF THE SUPREME COURT OF FLORIDA IN A CAPITAL APPEAL TO REWEIGH AND INDEPENDENTLY EVALUATE THE EVIDENCE ADDUCED TO ESTABLISH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AS IT IS REQUIRED TO DO UNDER FLORIDA'S DEATH PENALTY SENTENCING SCHEME DENIES A DEATH-SENTENCED DEFENDANT DUE PROCESS OF LAW AND SUBJECTS HIM TO CRUEL AND UNUSUAL PUNISHMENT.

Florida's capital sentencing procedures as defined in Section 921.141, Florida Statutes (A19-20), were designed to cure the unbridled discretion in capital sentencing which this Court condemned in Furman v. Georgia, 408 U.S. 238 (1972). A key factor in this Court's decision in Proffitt v. Florida, 428 U.S. 242 (1976), holding that the Florida statute had constitutionally cured this defect, was the role that the Florida Supreme Court played (as promised in earlier Florida decisions) in insuring that the death sentence was not imposed in an arbitrary or capricous manner.

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the

> ultimate penalty is warranted." Songer v. State, 322 So.2d 481, 484 (1975). See also Sullivan v. State, 303 So.2d 632, 637 (1974).

Id. at 252-253 (emphasis added).

This Court in Proffitt was relying on promises made in earlier Florida Supreme Court capital appeals wherein the state court emphasized its independent evaluation and reweighing function by referring to Florida's "trifurcated" sentencing process. See, e.g., Dobbert v. State, 375 So.2d 1069, 1071 (Fla. 1979); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

> The statute contemplates that the trial jury, the trial judge and this Court will exercise reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence. Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment.

Alvord v. State, 322 So.2d 533, 540 (Fla. 1975). The court's responsibility to review each and every death case "to provide the convicted defendant with one final hearing before death is imposed", State v. Dixon, 283 So.2d 1, 8 (Fla. 1973) is "a separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted." Songer v. State, 322 So.2d 481, 484 (Fla. 1975), vacated on other grounds, 430 U.S 952 (1977) (quoted in part in Proffitt v. Florida, supra, 428 U.S. at 253). In performing this responsibility, the Florida Supreme Court "evaulate[s] anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 834 (Fla. 1978). Accord: Peek v. State, 395 So.2d 492, 500 (Fla. 1981); Vasil v. State, 374 So.2d 465, 471 (Fla. 1979); McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977); Adams v. State, 341 So.2d 765, 769 (Fla. 1977); Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975).

The jury, the judge, and the Florida Supreme Court, then, all have significant functions in determining the appropriateness of a death sentence. Such intimate involvement with the facts of a case, the credibility of witnesses, and the correctness of a sentence is a radical departure from the normal appellate function of reviewing only legal errors. Nevertheless, the Florida Supreme Court accepted this unique burden in order for the State to have a constitutional death penalty statute. In the exercise of its "review" function, the court has repeatedly found mitigating circumstances in the trial court which the trial judge did not find, and reversed death sentences in light of those findings. See e.g., Mines v. State, 390 So.2d 332, 337 (Fla. 1980); Kampff v. State, 371 So.2d 1007, 1010 (Fla. 1979); Shue v. State, 336 So.2d 387, 389-390 (Fla. 1978); Huckaby v. State, 343 So.2d 29, 33-34 (Fla. 1977); Jones v. State, 332 So.2d 615, 619 (Fla. 1976); Taylor v. State, 294 So.2d 648, 651 (Fla. 1974). To have done so is certainly to have reevaluated the evidence adduced to established aggravating and mitigating circumstances, as the court promised it would.

It now appears, however, that that burden has proven too heavy, and the State Supreme Court has unloaded itself of some of the tasks it said it would perform in capital cases. Specifically, the court has refused to reweigh evidence and conduct the independent evaluation of the evidence this Court in Proffitt said the Florida Supreme Court would do. Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). In Brown, all the Florida death row inmates challenged the Florida Supreme Court's practice of considering, in the course of reviewing sentences of death, documents which were not made available to the Defendant's counsel. In rejecting that challenge, the Florida Supreme Court said:

> Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.
>
> It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court.

Id. at 1331-1332 (footnote omitted).

Quince is a victim of this retrenchment. On appeal, he asked the court, in accordance with its previous cases and with Proffitt, to independently reweigh and reevaluate the evidence adduced in support of mitigating circumstances, especially the statutory mitigating factors of mental impairment and age, and the nonstatutory factors concerning the petitioner's family background and borderline mental retardation. However, because of the Florida Supreme Court's about-face on its review function, the court refused to independently evalutate the mitigating evidence, citing the above-quoted language from Brown v. Wainwright, supra. (A3)

According to its own repeated actions and prior descriptions, and according to its promises on which this Court relied in approving Florida's death penalty, the Florida Supreme Court has never played so limited and myopic a role in capital appeals as the one which it ascribed to itself in the Brown opinion and which it has applied in the instant case. The Florida Supreme Court has broken its promises to this Court and to the people of Florida to "provide the convicted defendant with one final hearing" to determine "independently whether the

imposition of the ultimate penalty is warranted." State v. Dixon, supra at 8; Songer v. State, supra at 484. Florida has thus abandoned a crucial part of its death penalty scheme.

By refusing to independently reweigh evidence adduced in support of aggravating and mitigating factors, Florida has introduced a constitutionally unacceptable level of arbitrariness and capricousness into its capital sentencing structure. The Florida Supreme Court has refused to apply the appropriate measure of process which is due a death-sentenced defendant. See Gardner v. Florida, 430 U.S. 349 (1977).

Since the state supreme court now refuses to do what this Court in Proffitt said it must do, then this Court should re-examine Florida's death-sentencing procedures and remind the State of the promises it made in Proffitt. The petitioner's sentence as affirmed by the Florida Supreme Court is constitutionally infirm in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Upon the foregoing reasons, the petitioner asks this Court to grant a writ of certiorari.

Respectfully submitted,

By: Ronald K. Zimmet

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APPENDIX

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Kenneth Darrell QUINCE, Appellant,

v.

STATE of Florida, Appellee.

No. 59954.

Supreme Court of Florida.

March 4, 1982.

Rehearing Denied May 27, 1982.

Defendant was convicted in the Circuit Court, Volusia County, S. James Foxman, J., after he entered pleas of guilty to charges of felony-murder in the first degree and burglary. Direct appeal was taken from the imposition of the sentence of death. The Supreme Court held: (1) the trial judge did not err in giving only little weight to the sole mitigating factor, substantial impairment of defendant's capacity to appreciate the criminality of his act or to conform his conduct to the law; (2) the severe beating, wounding, raping and manual strangulation of an 82-year-old frail woman easily qualified as heinous; (3) it was not improper to double the aggravating circumstances when the judge found that the homicide was committed during a rape and was committed for pecuniary gain; (4) the record did not support the defendant's claims of additional mitigating factors; (5) both sides had equal opportunity for closing argument; and (6) even though it was improper to impose a general sentence for two separate offenses, there was no harm where the death penalty had been approved.

Sentence of death approved.

1. Criminal Law ⇐1208(1)

Defendant may be competent to stand trial, and yet nevertheless receive benefit of mitigating factors involving diminished mental capacity in determining whether death penalty should be imposed.

2. Homicide ⇐354

In imposing sentence of death following conviction of felony-murder in first degree and burglary predicated on guilty pleas, trial judge recognized "substantial impairment" mitigating factor and it was not unreasonable to fail to give great weight to that mitigating factor in light of three aggravating factors which had been found.

3. Homicide ⇐354

Severe beating, wounding, raping and manual strangulation of 82-year-old, frail woman qualified as "heinous" to justify imposition of death penalty.

See publication Words and Phrases for other judicial constructions and definitions.

4. Homicide ⇐354

When death penalty was imposed on defendant after conviction of felony-murder in the first degree and burglary predicated on guilty pleas, there was no improper doubling of aggravating circumstances when judge found that homicide was committed during rape and committed for pecuniary gain.

5. Homicide ⇐354

In imposing death sentence on defendant after conviction of felony-murder in first degree and burglary predicated on guilty pleas, trial judge did not improperly consider nonstatutory aggravating factors concerning likelihood of rehabilitation and lack of remorse.

6. Homicide ⇐354

In imposing death sentence on defendant after conviction of felony-murder in first degree and burglary predicated on guilty pleas, defendant's juvenile record could be used to dispel mitigating circumstance that defendant had no significant prior criminal history.

7. Criminal Law ⇐728(2)

Defendant waived issue of whether State was permitted two closing arguments in prosecution for felony-murder in the first degree and burglary predicated on guilty pleas where both sides had equal opportunity for argument and defendant failed to make definite objection. West's F.S.A. Rules Crim.Proc., Rule 3.780(c).

8. Criminal Law ⇐1177

Even though it was improper for trial judge to impose general sentence after defendant was convicted of felony-murder in the first degree and burglary predicated on guilty pleas, that did not mandate reversal where no harm would be caused to defendant by that error, since imposition of death penalty for felony-murder prosecution was appropriate.

James B. Gibson, Public Defender and James R. Wulchak, Chief, Appellate Div., Asst. Public Defender of the Seventh Judicial Circuit, Daytona Beach, for appellant.

Jim Smith, Atty. Gen. and Shawn L. Briese, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

This is a direct appeal from conviction of felony-murder in the first degree and burglary predicated on guilty pleas, and a sentence of death imposed by the trial court alone due to defendant's waiver of a sentencing jury. Art. V, § 3(b)(1), Fla.Const. Our sole task is to review the propriety of the death sentence.

In December of 1979, the body of an eighty-two year old woman dressed in a bloodstained nightgown was found lying on the floor of her bedroom. She had bruises on her forearm and under her ear, a small abrasion on her pelvis, and lacerations on her head, which were severe enough to cause death. She was sexually assaulted while alive, but the medical examiner could not determine whether the victim was conscious or unconscious during the battery. Strangulation was the cause of death.

Based upon a fingerprint identification, appellant was arrested. Although he initially denied knowledge of the incident, he later confessed to the burglary. He also admitted to stepping on the victim's stomach before leaving her house. A month later, when faced with laboratory test results, he admitted that he sexually assaulted the deceased. The grand jury returned an indictment charging the appellant with first-degree murder, burglary, and sexual battery.[1]

Pursuant to plea negotiations, appellant waived the right to a sentencing jury. After hearing and weighing the evidence, the trial judge imposed the death sentence, finding the existence of three aggravating circumstances: 1) the murder was committed during the commission of a rape; 2) the murder was committed for pecuniary gain; and 3) the murder was heinous. He considered and rejected all but one mitigating factor: appellant's inability to appreciate the criminality of his conduct. Due to the conflicting evidence, however, he decided that this factor deserved little weight.

We address first appellant's most forceful argument, in which he asserts that the trial judge erred in giving only little weight to the sole mitigating factor found, substantial impairment of capacity to appreciate the criminality of his act or to conform his conduct to the law.[2] The trial judge noted in his sentencing order, and the record supports, that although the experts agreed that Quince was not of normal intelligence, the exact degree of mental impairment could not be conclusively established. Four of the five experts that examined Quince found his mental condition did not warrant application of mitigating factors concerned with mental capacity. The fifth expert found Quince lacked the ability to appreciate the criminality of his acts, and compared his mental abilities to those of an eleven-year old. But age equivalency as an expression of Quince's mental ability was sharply questioned by one expert, and essentially rejected by another. The consensus seems to have been that Quince was of dull normal or borderline intelligence, but was not mentally retarded. No expert had found Quince incompetent to stand trial.

1. The sexual battery charge was later dismissed because it was the underlying felony to the felony-murder offense.

2. § 921.141(6)(f), Fla.Stat. (1979).

[1, 2] We are well aware that a defendant may be competent to stand trial, yet nevertheless receive the benefit of the mitigating factors involving diminished mental capacity. *See Mines v. State*, 390 So.2d 332, 337 (Fla.1980), *cert. denied*, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981). But we do not interpret *Mines* to require any more from a trial judge than that he give due consideration and weight to these factors in his sentence. Here the trial judge recognized the "substantial impairment" mitigating factor, but found that it did not outweigh the three aggravating factors.

This is not a case in which a jury has rendered a recommendation of life based on evidence of mental incapacity and the trial judge has rejected such a recommendation. *See, e.g., Neary v. State*, 384 So.2d 881 (Fla.1980); *Shue v. State*, 366 So.2d 387 (Fla.1978); *Jones v. State*, 332 So.2d 615 (Fla.1976). All of these cases are based on the rationale that the jury's recommendation can only be rejected for a compelling reason, because the jury represents "the conscience and mores of the community in which the crimes were committed." *Jones*, 332 So.2d at 622 (Sundberg, J., concurring). This is not a case in which the trial judge failed entirely to take the defendant's mental condition into account. *See Mines*. The trial judge demonstrated in his sentencing order his close consideration of this very factor. Nor is this a case in which the trial judge considered matters he should not have.

Rather, this is a case in which the appellant disagrees with the *weight* that the trial judge accorded the mitigating factor. But mere disagreement with the force to be given such evidence is an insufficient basis for challenging a sentence. *See Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla.1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981) (footnote omitted). The trial judge was not unreasonable in failing to give great weight to this mitigating factor, which he nevertheless did find to exist, in the light of contradictory evidence. The trial judge clearly did not ignore every aspect of the medical testimony as the judge did in *Huckaby v. State*, 343 So.2d 29 (Fla.), *cert. denied*, 434 U.S. 920, 98 S.Ct. 393, 54 L.Ed.2d 276 (1977).[3]

[3–5] Appellant further assails the sentence on sundry grounds. He claims the murder was not heinous. We believe that the severe beating, wounding, raping, and manual strangulation of an eighty-two year old, frail woman easily qualified as heinous. *Cf. Peek v. State*, 395 So.2d 492 (Fla.1980), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981) (beating, rape and strangulation of sixty-five year old woman is heinous). He next asserts that the underlying felony of sexual battery may not be used in aggravation. Florida's death penalty statute clearly allows the use of the underlying felony in aggravation, and that statute is constitutional. *See Proffitt v.*

3. *Huckaby v. State* also differs from the present case because the capital crime was rape of a child, for which imposition of death has since been declared unconstitutional. *Buford v. State*, 403 So.2d 943 (Fla.1981). There was also overwhelming evidence of defendant's mental illness in *Huckaby*.

Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Appellant contends that there was an improper doubling of aggravating circumstances when the judge found that the homicide was committed during a rape and was committed for pecuniary gain,[4] and then used these facts as parts of his heinous finding. But doubling has been disallowed when the underlying felony is robbery or burglary and is considered in addition to the aggravating factor of "committed for pecuniary gain." *See Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Appellant argues an improper consideration of nonstatutory aggravating factors when evidence was given concerning likelihood of rehabilitation and lack of remorse. But neither of these factors were considered in aggravation by the judge in his sentencing order and were accorded no weight in the sentencing process.

[6] Quince complains that certain additional factors should have been found in mitigation. He posits that because his record of past offenses is a juvenile record and too remote, he should have been found to have no significant prior criminal history. This Court has allowed juvenile records to dispel this mitigating circumstance when the circumstances warrant. *See Brooker v. State*, 397 So.2d 910 (Fla.1981). These juvenile offenses were not trivial, and included armed robbery and burglary. Quince pleads that his age of twenty years is a mitigating factor. Yet, as we stated in *Peek v. State*, there is no per se rule that pinpoints an age as a mitigating factor. *Id.* at 498. *Peek* in fact upheld the rejection of the age of nineteen as a mitigating factor. Nor does the record support appellant's claim that the trial judge limited his consideration to only statutory mitigating circumstances.

[7] Quince finally assails the formalities of the sentencing procedure. He complains that the state was permitted two closing arguments in violation of Florida Rule of Criminal Procedure 3.780(c).[5] The record establishes, however, that both sides had an equal opportunity for argument. The appellant did not make a definite objection to the allowance of two arguments for both sides, and therefore waived this error. *See Clark v. State*, 363 So.2d 331 (Fla.1978); *State v. Jones*, 204 So.2d 515 (Fla.1967).

[8] Quince's final argument is that a general sentence was improperly imposed on him for two separate offenses, violating the dictates of *Dorfman v. State*, 351 So.2d 954 (Fla.1977). General sentences are also prohibited by statute. § 775.021(4), Fla. Stat. (1979). Although appellant is technically quite correct in asserting the trial judge was in error in imposing such a general sentence, and we must disapprove the practice, we cannot say that Quince's sentence is similar to that involved in *Dorfman*. The death sentence Quince received could only have been imposed for the murder he committed, not for the burglary. If we had vacated the murder conviction, the death sentence would necessarily have fallen. Thus, we face none of the "inscrutability" created by the general sentence in *Dorfman*. *Id.* at 957. Second, since death is deemed the proper penalty, concerns that a general sentence interferes with the rehabilitative process are moot. *See Dorfman*, 351 So.2d at 955 n. 7. We fail to see the harm caused to appellant by this error since he stands only to lose on resentencing, in light of our approval of the death penalty.

Although each murder conviction and death sentence presents amazingly unique circumstances, we find that death is the justifiable punishment in light of the existence of three aggravating factors and one mitigating factor, and that such a heavy penalty is proportionate to those meted out in similar cases. *See, e.g., Brooker v. State; McCrae v. State*, 395 So.2d 1145 (Fla.1980); *Peek v. State*.

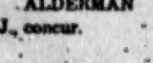
4. The appellant confessed both to the burglary and rape of the victim, and could hardly contest that these factors did not exist beyond a reasonable doubt.

5. "Both the state and the defendant will be given an equal opportunity for argument, each being allowed one argument. The state will present argument first."

Accordingly, the sentence of death is approved.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.



Virginia WEST, Petitioner,

v.

Richard B. WEST, Respondent.

No. 57305.

Supreme Court of Florida.

April 29, 1982.

Former wife sued former husband alleging that during their marriage the husband intentionally injured her by throwing her to the floor, causing a triple fracture of her left ankle. The Trial Court dismissed complaint for failure to state cause of action on ground of interspousal tort immunity, and the former wife appealed. The District Court of Appeal affirmed trial court's dismissal and certified question to the Supreme Court. The Supreme Court, Overton, J., held that former spouse cannot maintain an action in tort against other spouse for an intentional tort allegedly committed during marriage where marriage has since been dissolved by divorce.

Ordered accordingly.

Sundberg, C. J., and Adkins, J., dissented.

1. Husband and Wife ⇐205(2)

A former spouse cannot maintain an action in tort against other spouse for intentional tort allegedly committed during marriage where marriage has since been dissolved by divorce.

2. Divorce ⇐243, 252.4

Trial court in dissolution proceeding properly retained jurisdiction to award permanent alimony to former wife "in the event that modification is necessary in the future case of any disability the wife may have that is directly related to the injuries she sustained during her marriage to the Husband" and properly directed the former husband to pay all doctor, medical and hospital bills, not otherwise covered by insurance, which resulted from the husband's tortious injury to the wife.

Richard H. Langley, Clermont, for petitioner.

Arthur E. Roberts, Groveland, for respondent.

Elizabeth S. Baker, Miami, for Legal Services of Greater Miami, Inc.

Patricia Ireland, Miami, and Julia Dawson, North Miami, for Nat. Organization for Women in Florida and Florida Now.

Judith Bass, Miami, for Florida Ass'n of Women Lawyers.

Frances M. Farina, Miami Shores, for Florida Women's Political Caucus.

Roberta Fox of Gold & Fox, Coral Gables, H. Jack Klingensmith of Kuvin, Klingensmith & Lewis, South Miami, and Spencer Fox, Miami, for Cassandra Newby.

Bruce Rogow, Fort Lauderdale, for American Civil Liberties Union Foundation of Florida.

Dade County Advocate for Victims, Miami, and Forum, University of Miami, School of Law, Coral Gables, on brief for amicus curiae.

OVERTON, Judge.

Petitioner, Virginia West, sued her former husband, Richard B. West, alleging that during their marriage the husband intentionally injured her by throwing her to the floor, causing a triple fracture of her left ankle. The trial court dismissed the complaint for failure to state a cause of

IN THE SUPREME COURT OF FLORIDA

CASE NO. 59,954

KENNETH DARCELL QUINCE,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

MOTION FOR REHEARING

The Appellant, by his undersigned counsel, and pursuant to Rule 9.330, Florida Rules of Appellate Procedure, moves this Court for a rehearing in the above-styled cause. As grounds for the rehearing, the Appellant suggests that this Court has overlooked or misapprehended the following points of law or fact:

1. On page 2 of the slip opinion, this Court states that the record supports that "the exact degree of [Quince's] mental impairment could not be conclusively established" and that "[f]our of the five experts that examined Quince found his mental condition did not warrant application of mitigating factors concerned with mental capacity." However, it must be noted, and this Court has apparently overlooked the fact that only two experts were asked to examine the defendant for potential mitigating circumstances, (R 5-6, 7-8, 13-14) and only Dr. McMillan performed specific tests for this purpose. (T 115, 158) The two experts who examined Quince for mental impairment agreed that Quince was mentally retarded, and was "not functioning with all his marbles." (R 57; T 144, 157-158) Even the state's psychiatrist agreed that Quince was of below normal intelligence, functioning in the "dull-normal" range. (R 54; T 111, 128-129) Thus, contrary to this Court's opinion, the record does show Quince's exact degree of mental impairment.

The defendant's dull-normal, borderline retarded intelligence is surely a mitigating factor, either under Section 921.141(6)(f), Florida Statutes (1979), or else as a non-statutory mitigating factor. Moreover, the Court has misapprehended the reports of Drs. Rossario and Carrera. These psychiatrists did not find, as erroneously stated in the opinion, that Quince's mental condition did not warrant application of mitigating factors, since their reports and opinions were concerned solely with Quince's competence to stand trial and his sanity. Nonetheless, Dr. Rossario did indicate in his report that Quince's "judgement is markedly impaired...." (R 55)

Thus, this Court has overlooked and/or misapprehended the psychiatric reports conclusively showing, contrary to the trial judge's findings and this Court's opinion, that the mitigating factors (statutory and non-statutory) concerned with mental capacity are entitled to great weight which outweigh any aggravating factors.

2. Next, this Court in stating at slip opinion page 3, "Nor is this a case in which the trial judge considered matters he should not have," has overlooked the fact that the trial court allowed testimony, over defense objections, as to Quince's lack of remorse (T 56), and, in fact, personally elicited testimony concerning the possibility of Quince's rehabilitation. (T 148) See also slip opinion, at page 5. This non-statutory evidence was improperly elicited, admitted, and therefore presumably considered by the trial judge. See Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); Riley v. State, 366 So.2d 19 (Fla. 1978); Miller v. State, 373 So.2d 882 (Fla. 1979). The defendant's sentence was therefore impermissibly imposed in violation of Article I, Sections 9 and 17 of the Florida Constitution, and the Eighth and Fourteenth Amendments to the Constitution of the United States.

3. This Court, in its opinion at pages 3-4 exhibits a recent change in its sentence review function, claiming that this Court will no longer weigh or reevaluate evidence concerning aggravating or mitigating factors in comparison with prior decisions. This holding overlooks the mandate of State v. Dixon, 283 So.2d 1, 8 and 10 (Fla. 1973), Songer v. State, 322 So.2d 481, 484 (Fla. 1975), and Proffitt v. Florida, 428 U.S. 242 (1976), to determine independently whether the imposition of the ultimate penalty is warranted. As the Supreme Court of the United States noted in Proffitt, 428 U.S. at 252-253:

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." Songer v. State, 322 So.2d 481, 484 (1975). See also Sullivan v. State, 303 So.2d 632, 637 (1974)

This Court's change from its independent sentence review responsibilities, overlooks these decisions and renders Florida's death penalty unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution since the discretion of juries and judges is no longer controlled and channeled, and the penalty is being imposed and affirmed in an arbitrary and capricious manner.

4. In affirming the finding of heinous, atrocious, or cruel, this Court has overlooked the more gruesome facts of Halliwell v. State, 323 So.2d 557 (Fla. 1975); Burch v. State, 343 So.2d 831 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Jones v. State, 332 So.2d 615 (Fla. 1976); and other cases in which this Court has found this aggravating circumstance to be lacking. In citing Peek v. State, 395 So.2d 492 (Fla. 1980), as a similarly heinous case, this Court overlooks the fact that the extremes present in Peek were simply not

present in the instant case; there were no crushed ribs nor the degree of suffering which was present in Peek. The victim in the instant case was not severely beaten, but was bruised on her arms only from striking the defendant. She was sexually assaulted when she was unconscious. (R 54) Additionally, the Court has overlooked the fact that any "heinousness" was caused by Quince's mental retardation and impairment. (T 144, 147-149) See Huckaby v. State, 343 So.2d 29, 34 (Fla. 1977); Miller v. State, 373 So.2d 882, 886 (Fla. 1979).

5. This Court, in rejecting Appellant's "doubling" argument states at pages 4-5 that doubling has only been disallowed when the underlying felony of robbery is considered in addition to the aggravating factor of "committed for pecuniary gain." This holding overlooks the decision of Clark v. State, 379 So.2d 97 (Fla. 1980), wherein an improper doubling was found by consideration of both factors of "for purpose of avoiding or preventing a lawful arrest" and "to disrupt or hinder a governmental function." See also Maggard v. State, 399 So.2d 973, 977 (Fla. 1981), wherein the Court found an improper doubling of burglary and pecuniary gain. The Court's opinion has misapprehended the "doubling" argument here. Appellant contended that the trial judge, in finding the sexual battery and burglary as aggravating circumstances, should not also have been allowed to refer to these factors in support of his finding of heinous, atrocious, or cruel. To do so violates Provence v. State, 337 So.2d 783, 786 (Fla. 1976). By using the fact of the sexual battery to make the crime heinous, and by using the burglary to make the killing heinous, the judge improperly referred to the same aspects of the defendant's crime to find three aggravating factors rather than two. The finding of heinous, atrocious, or cruel must be stricken as an improper doubling.

6. The Court, in rejecting the defendant's age of twenty as a mitigating factor, overlooks the cases of King v. State, 340 So.2d 315 (Fla. 1980) (age 23); Mikenas v. State, 367 So.2d 606 (Fla. 1978) (age 22); Hoy v. State, 353 So.2d 826 (Fla. 1977) (age 22); and Hallman v. State, 305 So.2d 180 (Fla. 1974) (age 23), wherein older ages in similar cases have been considered as mitigating factors. This Court also overlooked the fact that Quince's age can be coupled with the fact of his "dull-normal" intelligence to find a strong mitigating factor as was the case in Meeks v. State, 336 So.2d 1142 (Fla. 1976).

7. Finally, this Court's opinion overlooks the strong non-statutory mitigating factors of the defendant's tough personal and family life as argued at page 17 of the initial brief which factors were quite similar to those justifying a reversal to a life sentence in Neary v. State, 384 So.2d 881 (Fla. 1980). To overlook these mitigating factors renders the defendant's sentence unconstitutional under the rationale of Lockett v. Ohio, 438 U.S. 586 (1978), and under the comparative review standards required by Proffitt v. Florida, supra.

WHEREFORE, the appellant respectfully requests that this Honorable Court grant this motion for rehearing, withdraw the March 4th opinion in this cause, and reverse the case for imposition of a life sentence.

Respectfully submitted,

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
1012 South Ridgewood Avenue
Daytona Beach, FL 32014
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Jim Smith, Attorney General, in his basket at the Fifth District Court of Appeal and mailed to: Mr. Kenneth D. Quince, Inmate No. 075812, Florida State Prison, P. O. Box 747, Starke, FL 32091 on this 17th day of March, 1982.

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER

Supreme Court of Florida

THURSDAY, MAY 27, 1982

KENNETH DARCELL QUINCE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 59,954

Circuit Court No. 80-48-CC
(Volusia)

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Deputy Clerk

TC
cc: Hon. V. Y. Smith, Clerk
Hon. S. James Foxman, Judge

James R. Wulchak, Esquire
Shawn L. Briese, Esquire

STATE OF FLORIDA

VS.

KENNETH DARCELL QUINCE

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY STATE OF FLORIDA, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND EIGHTY

INDICTMENT

THE FALL TERM GRAND JURY in and for VOLUSIA County, Florida, empaneled and sworn to inquire and true presentment make, hereby, in the name of and by the authority of the State of Florida, bring this prosecution and make the following charge or charges in THREE (3) counts:

COUNT I

CHARGE: Murder in the First Degree in Violation of F.S. 782.04

SPECIFICATIONS OF CHARGE: In that KENNETH DARCELL QUINCE, did, on or about the 28th day of December, 1979, in Volusia County, Florida, then and there unlawfully and from a premeditated design to effect the death of one Frances Bowdoin, a human being, did kill and murder Frances Bowdoin, by strangulation.

COUNT II

CHARGE: SEXUAL BATTERY in Violation of F.S. 794.011

SPECIFICATIONS OF CHARGE: In that KENNETH DARCELL QUINCE did, on or about the 28th day of December, 1979, in Volusia County, Florida, then and there unlawfully commit a sexual battery upon Frances Bowdoin, a person over the age of eleven (11) years, to-wit: 82 years of age by vaginal penetration or union with the sexual organ of another or the anal, or vaginal penetration of another by any other object, without the consent of Frances Bowdoin and in the process thereof used or threatened to use a deadly weapon or used actual physical force likely to cause serious personal injury.

COUNT III

CHARGE: BURGLARY OF OCCUPIED DWELLING, in Violation of F.S. 810.02

SPECIFICATIONS OF CHARGE: In that KENNETH DARCELL QUINCE did, on or about the 28th day of December, 1979, in Volusia County, Florida, did unlawfully commit burglary of a dwelling, the property of Frances Bowdoin located in the vicinity of 133 White St. Daytona Beach, in the County and State aforesaid, the same being occupied by Frances Bowdoin, a human being, with the intent to commit an offense therein, to-wit: Theft and in the course of committing said offense the said Kenneth Darcell Quince did make an assault upon Frances Bowdoin.

A TRUE BILL

Foreman of the Grand Jury

I, the undersigned State Attorney or Assistant State Attorney, as authorized and required by law, have advised the Grand Jury returning this indictment.

State Attorney
Seventh Judicial Circuit of Florida

This indictment presented by the aforesaid Grand Jury in open court this 17 day of January, 19 80, and on the 17 day of Jan. 19 80, at the hour of 3:45 P.M. was filed by me.

Clerk of the Circuit Court

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA.

CASE NO. 80-48-CC

STATE OF FLORIDA

vs.

KENNETH DARCELL QUINCE,

Defendant.

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BOOK 2210 PAGE 1598

JUDGMENT AND SENTENCE

You, KENNETH DARCELL QUINCE, being now before the Court attended by your attorney, HOWARD B. PEARL, and having pled Guilty to the crimes of Murder in the First Degree-Count I and Burglary of an Occupied Dwelling-Count III, the Court now adjudges you to be guilty of said offenses. What have you to say why the sentence of the law should not be pronounced upon you? Saying nothing, it is the sentence of the law and such is the Judgment of the Court that you, KENNETH DARCELL QUINCE, be delivered by the Sheriff of Volusia County, Florida, with a copy of this sentence forthwith, to the proper officer of the Department of Corrections, and by him safely kept until by warrant of the Governor of the State of Florida, you, KENNETH DARCELL QUINCE, be electrocuted until you are dedd. May God have mercy on your soul.

The Court's findings in support of the death penalty are filed concurrently herewith.

You are hereby notified of your right to appeal the finding of guilt and/or sentence within 30 days from the date hereof.

If you are an indigent person counsel will be appointed for you.

DONE AND ORDERED in Open Court at DeLand, Volusia County, Florida, this 21 day of October, 1980.

S. JAMES FOXMAN, CIRCUIT JUDGE

You are hereby adjudicated Guilty as to Count III and your sentence as to said Count shall run concurrent with Count I hereof.

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BOOK PAGE

IN THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA
COUNTY, FLORIDA.

SPRING TERM, 1980
CASE NO. 80-48-CC

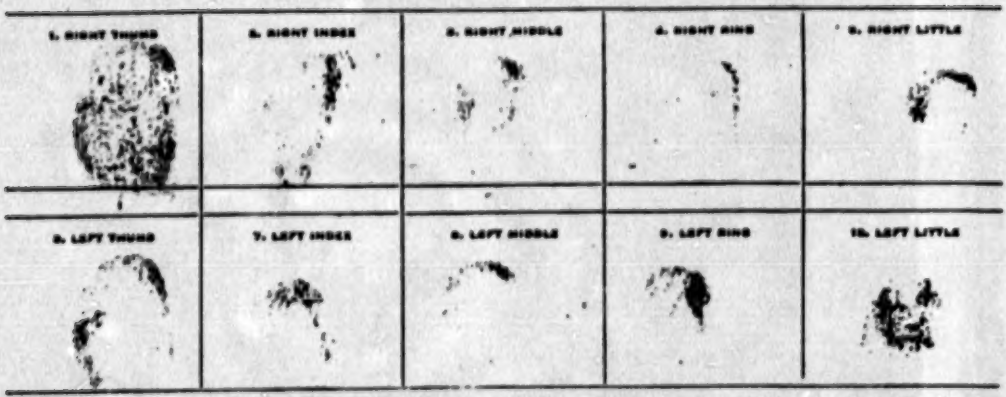
THE STATE OF FLORIDA

VS.

KENNETH DARCELL QUINCE

Defendant.

APPENDAGE TO JUDGMENT AND SENTENCE



I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment are the fingerprints of the Defendant KENNETH DARCELL QUINCE and that they were placed thereon by said Defendant in my presence in Open Court, this 21 day of October 19 80

Prints taken by;

Deputy Sheriff

S. JAMES FOSMAN Circuit Judge

Filed in Open Court and Recorded in Circuit Court Minute Book No. _____, Page _____, this 21st day of October 1980.

V. Y. SMITH
Clerk of Circuit Court,
Seventh Judicial Circuit,
Volusia County, Florida.

By _____,
Deputy Clerk

K 15

056888

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA.

CASE NO. 80-48-CC

STATE OF FLORIDA

vs.

KENNETH DARCELL QUINCE,

Defendant.

COURT'S FINDINGS OF FACTS IN SUPPORT OF THE DEATH PENALTY

I. INTRODUCTION:

On August 11, 1980 the Defendant, KENNETH DARCELL QUINCE, pled guilty to first degree murder and burglary of an occupied dwelling. The charge of sexual battery was merged into the murder charge. Both the Defense and the State affirmatively waived a sentencing jury. It was agreed to have the Court alone determine the proper sentence.

On October 20, 1980 a sentence hearing was held in DeLand, Florida. The Court heard live testimony, received evidence, and also received into evidence the reports of four psychiatrists and one psychologist. The Court also ordered and considered a Presentence Investigation Report dated August 28, 1980 (Presentence Investigation Report attached hereto as Court's Exhibit).

II. AGGRAVATING CIRCUMSTANCES:

The Court found that the following aggravating circumstances existed beyond a reasonable doubt:

1. F. S. 921.141(5)(d) - The murder was committed while the Defendant was committing rape.

2. F. S. 921.141(5)(f) - The murder was committed for pecuniary gain. (The Court does not feel this finding duplicates the finding of (5)(d); See St. vs. Brown, 381 So.2d 690 (Fl., 1980)).

3. F. S. 921.141 (5)(h) - The murder was especially heinous, atrocious and cruel. The strangulation of Frances Bowdoin by the Defendant during the burglary of her home might be heinous, atrocious and cruel in itself. But when the strangulation is accompanied by the rape of a frail 82 year old woman by a 20 year old,

6'4" defendant, the crime becomes unspeakable. It is shockingly evil and outrageously wicked.

The last moments of Frances Bowdoin's life were filled with terror. She saw the Defendant in her house. She closed her bedroom door. He broke into the bedroom. He silenced her screams on one, and perhaps two, occasions. She received two vicious blows to the top of her head. She received bruises defending herself. She was sexually assaulted while alive, and eventually strangled by the Defendant's hand. At one point while the deceased was lying on the floor, presumably dead or unconscious, the Defendant stepped on her stomach. Taking into account all the circumstances, the Court finds the Defendant was utterly indifferent to her suffering.

III. MITIGATING CIRCUMSTANCES:

As the Court found three aggravating circumstances existed, it will analyze each mitigating circumstance.

1. F. S. 921.141(6)(a) - The Court finds the Defendant has a significant prior criminal history. The Defendant's criminal history includes robbery charges and several burglary of dwellings. Although these offenses were committed while the Defendant was a juvenile, the Court feels his juvenile record represents a significant prior criminal history (See St. vs. Gibson, 351 So.2d 948 (Fl., 1980).

2. F. S. 921.141(6)(b) - The three experts who testified live at the sentencing hearing all agreed this criteria was not met. The Court agrees and finds it inapplicable.

3. F. S. 921.141(6)(c) - Not applicable.

4. F. S. 921.141(6)(d) - Not applicable.

5. F. S. 921.141(6)(e) - Not applicable.

6. F. S. 921.141(6)(f) - This criteria has caused the Court difficulty. All five experts agree the Defendant was of below normal intelligence. At least two felt he was on the borderline of mental retardation. Yet at the sentencing hearing two psychiatrists, one of whom was a defense witness, said this criteria did not exist. Only Dr. McMillan said it did exist.

Additionally, there was uncontradicted evidence that the Defendant did use alcohol and marijuana prior to the offense. Again, only Dr. McMillan feels this factor, in combination with

Defendant's low intelligence, meets the criteria of this mitigating factor.

The evidence regarding this mitigating factor is contradictory and confusing. The Court does note, however, that the Defendant's behavior and appearance at the plea and at the day long sentencing hearing seem to bear out the defense contentions. Giving the Defendant the benefit of the doubt the Court finds this mitigating factor does exist. The Court immediately adds that it does not feel this factor should be accorded much weight. It is not a strong and clear mitigating factor.

7. F. S. 921.141(6)(g) - The Court does not feel the Defendant's age is a mitigating factor. The Defendant was nearly 21 at the time of the offense. As far as the Court could tell, age played no part in this offense. The Court has read all the decisions regarding age as a mitigating factor it could find. It appears the question must be analyzed on a case by case basis. The Court has considered the Defendant's age and rejects it as a mitigating factor.

IV. CONCLUSION:

The Court found three aggravating and one mitigating circumstances. The Court finds the one mitigating factor is not entitled to a great deal of weight. The last aggravating factor (F. S. 921.141(5)(h)) is especially strong. The aggravating circumstances outweight the mitigating. The Defendant should be sentenced to death.

S. JAMES FOXMAN, CIRCUIT JUDGE

October 21, 1980

921.141 Sentence of death or life imprisonment capital felonies; further proceedings to determine sentence.--

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 82-5096

KENNETH DARCELL QUINCE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, KENNETH DARCELL QUINCE, through his undersigned counsel and prusuant to United States Supreme Court Rule 46, asks this Court for leave to proceed in forma pauperis. The Petitioner has been represented by appointed counsel throughout his state court trial and appeal proceedings, and his Affidavit in support of this Motion is attached.

Respectfully submitted,

BY: Ronald K. Zimmet

RONALD K. ZIMMET
Attorney for Petitioner
Chief Assistant Public Defender
1012 South Ridgewood Avenue
Daytona Beach, FL 32014-6183
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014 on this 19th day of July, 1982.

BY: Ronald K. Zimmet

RONALD K. ZIMMET
Chief Assistant Public Defender

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH DARCELL QUINCE,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO.

AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

I, KENNETH DARCELL QUINCE, being first duly sworn, depose and say that I am the Petitioner in the above styled case; that in support of my motion to proceed on my Petition for Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor; and that I believe I am entitled to redress upon the issues presented in the Petition for Writ of Certiorari.

I further swear that:

1. I was convicted in the Circuit Court for Volusia County, Florida, for first degree murder and burglary following pleas of guilty.

2. I received a sentence of death for first degree murder and am presently in custody on Death Row at Florida State Prison.

3. I appealed to the Supreme Court of Florida and that Court affirmed my convictions and sentences.

4. I am not employed and have no source of income.

5. I do not have any real estate, stocks, bonds, notes, automobiles or any other valuable property.

6. I have been represented by appointed counsel throughout my state trial and appeal proceedings.

STATE OF FLORIDA
COUNTY OF _____

Kenneth Quince
KENNETH DARCELL QUINCE

Bonita L. Howard
NOTARY PUBLIC
Sworn to and subscribed
before me this 14th day
of June, 1982.

My Commission Expires:
NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Aug. 24, 1985

IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO. 82-5096

KENNETH DARCELL QUINCE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

A P P E N D I X

APPENDIX

	APPENDIX
March 4, 1982; Quince v. State, 414 So.2d 185 (Fla. 1982)	1
March 17, 1982; Petitioner's Motion for Rehearing	2
May 8, 1981; Petitioner's Initial Brief	3
May 27, 1982; Order Denying Petitioner's Motion for Rehearing	4

Kenneth Darrell QUINCE, Appellant,

v.

STATE of Florida, Appellee.

No. 59954.

Supreme Court of Florida.

March 4, 1982.

Rehearing Denied May 27, 1982.

Defendant was convicted in the Circuit Court, Volusia County, S. James Foxman, J., after he entered pleas of guilty to charges of felony-murder in the first degree and burglary. Direct appeal was taken from the imposition of the sentence of death. The Supreme Court held: (1) the trial judge did not err in giving only little weight to the sole mitigating factor, substantial impairment of defendant's capacity to appreciate the criminality of his act or to conform his conduct to the law; (2) the severe beating, wounding, raping and manual strangulation of an 82-year-old frail woman easily qualified as heinous; (3) it was not improper to double the aggravating circumstances when the judge found that the homicide was committed during a rape and was committed for pecuniary gain; (4) the record did not support the defendant's claims of additional mitigating factors; (5) both sides had equal opportunity for closing argument; and (6) even though it was improper to impose a general sentence for two separate offenses, there was no harm where the death penalty had been approved.

Sentence of death approved.

1. Criminal Law ⇐1208(1)

Defendant may be competent to stand trial, and yet nevertheless receive benefit of mitigating factors involving diminished mental capacity in determining whether death penalty should be imposed.

2. Homicide ⇐354

In imposing sentence of death following conviction of felony-murder in first degree and burglary predicated on guilty pleas, trial judge recognized "substantial impairment" mitigating factor and it was not unreasonable to fail to give great weight to that mitigating factor in light of three aggravating factors which had been found.

3. Homicide ⇐354

Severe beating, wounding, raping and manual strangulation of 82-year-old, frail woman qualified as "heinous" to justify imposition of death penalty.

See publication Words and Phrases for other judicial constructions and definitions.

4. Homicide ⇐354

When death penalty was imposed on defendant after conviction of felony-murder in the first degree and burglary predicated on guilty pleas, there was no improper doubling of aggravating circumstances when judge found that homicide was committed during rape and committed for pecuniary gain.

5. Homicide ⇐354

In imposing death sentence on defendant after conviction of felony-murder in first degree and burglary predicated on guilty pleas, trial judge did not improperly consider non-statutory aggravating factors concerning likelihood of rehabilitation and lack of remorse.

6. Homicide ⇐354

In imposing death sentence on defendant after conviction of felony-murder in first degree and burglary predicated on guilty pleas, defendant's juvenile record could be used to dispel mitigating circumstance that defendant had no significant prior criminal history.

7. Criminal Law ⇐724(2)

Defendant waived issue of whether State was permitted two closing arguments in prosecution for felony-murder in the first degree and burglary predicated on guilty pleas where both sides had equal opportunity for argument and defendant failed to make definite objection. West's F.S.A. Rules Crim.Proc., Rule 3.780(c).

APP. 1

8. Criminal Law ⇐1177

Even though it was improper for trial judge to impose general sentence after defendant was convicted of felony-murder in the first degree and burglary predicated on guilty pleas, that did not mandate reversal where no harm would be caused to defendant by that error, since imposition of death penalty for felony-murder prosecution was appropriate.

James B. Gibson, Public Defender and James R. Wulchak, Chief, Appellate Div., Asst. Public Defender of the Seventh Judicial Circuit, Daytona Beach, for appellant.

Jim Smith, Atty. Gen. and Shawn L. Briese, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

This is a direct appeal from conviction of felony-murder in the first degree and burglary predicated on guilty pleas, and a sentence of death imposed by the trial court alone due to defendant's waiver of a sentencing jury. Art. V, § 3(b)(1), Fla.Const. Our sole task is to review the propriety of the death sentence.

In December of 1979, the body of an eighty-two year old woman dressed in a bloodstained nightgown was found lying on the floor of her bedroom. She had bruises on her forearm and under her ear, a small abrasion on her pelvis, and lacerations on her head, which were severe enough to cause death. She was sexually assaulted while alive, but the medical examiner could not determine whether the victim was conscious or unconscious during the battery. Strangulation was the cause of death.

Based upon a fingerprint identification, appellant was arrested. Although he initially denied knowledge of the incident, he later confessed to the burglary. He also admitted to stepping on the victim's stomach before leaving her house. A month later, when faced with laboratory test results, he admitted that he sexually assaulted the deceased. The grand jury returned an indictment charging the appellant with first-degree murder, burglary, and sexual battery.[1]

Pursuant to plea negotiations, appellant waived the right to a sentencing jury. After hearing and weighing the evidence, the trial judge imposed the death sentence, finding the existence of three aggravating circumstances: 1) the murder was committed during the commission of a rape; 2) the murder was committed for pecuniary gain; and 3) the murder was heinous. He considered and rejected all but one mitigating factor: appellant's inability to appreciate the criminality of his conduct. Due to the conflicting evidence, however, he decided that this factor deserved little weight.

We address first appellant's most forceful argument, in which he asserts that the trial judge erred in giving only little weight to the sole mitigating factor found, substantial impairment of capacity to appreciate the criminality of his act or to conform his conduct to the law.[2] The trial judge noted in his sentencing order, and the record supports, that although the experts agreed that Quince was not of normal intelligence, the exact degree of mental impairment could not be conclusively established. Four of the five experts that examined Quince found his mental condition did not warrant application of mitigating factors concerned with mental capacity. The fifth expert found Quince lacked the ability to appreciate the criminality of his acts, and compared his mental abilities to those of an eleven-year old. But age equivalency as an expression of Quince's mental ability was sharply questioned by one expert, and essentially rejected by another. The consensus seems to have been that Quince was of dull normal or borderline intelligence, but was not mentally retarded. No expert had found Quince incompetent to stand trial.

1. The sexual battery charge was later dismissed because it was the underlying felony to the felony-murder offense.

2. § 921.141(6)(f), Fla.Stat. (1979).

[1, 2] We are well aware that a defendant may be competent to stand trial, yet nevertheless receive the benefit of the mitigating factors involving diminished mental capacity. *See Mines v. State*, 390 So.2d 332, 337 (Fla.1980), *cert. denied*, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981). But we do not interpret *Mines* to require any more from a trial judge than that he give due consideration and weight to these factors in his sentence. Here the trial judge recognized the "substantial impairment" mitigating factor, but found that it did not outweigh the three aggravating factors.

This is not a case in which a jury has rendered a recommendation of life based on evidence of mental incapacity and the trial judge has rejected such a recommendation. *See, e.g., Neary v. State*, 384 So.2d 881 (Fla.1980); *Shue v. State*, 366 So.2d 387 (Fla.1978); *Jones v. State*, 332 So.2d 615 (Fla.1976). All of these cases are based on the rationale that the jury's recommendation can only be rejected for a compelling reason, because the jury represents "the conscience and mores of the community in which the crimes were committed." *Jones*, 332 So.2d at 622 (Sundberg, J., concurring). This is not a case in which the trial judge failed entirely to take the defendant's mental condition into account. *See Mines*. The trial judge demonstrated in his sentencing order his close consideration of this very factor. Nor is this a case in which the trial judge considered matters he should not have.

Rather, this is a case in which the appellant disagrees with the *weight* that the trial judge accorded the mitigating factor. But mere disagreement with the force to be given such evidence is an insufficient basis for challenging a sentence. *See Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation. *Brown v. Wainwright*, 392 So.2d 1327, 1331 (Fla.1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981) (footnote omitted). The trial judge was not unreasonable in failing to give great weight to this mitigating factor, which he nevertheless did find to exist, in the light of contradictory evidence. The trial judge clearly did not ignore every aspect of the medical testimony as the judge did in *Huckaby v. State*, 343 So.2d 29 (Fla.), *cert. denied*, 434 U.S. 930, 98 S.Ct. 393, 54 L.Ed.2d 276 (1977).[3]

[3-5] Appellant further assails the sentence on sundry grounds. He claims the murder was not heinous. We believe that the severe beating, wounding, raping, and manual strangulation of an eighty-two year old, frail woman easily qualified as heinous. *Cf. Peek v. State*, 395 So.2d 492 (Fla.1980), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981) (beating, rape and strangulation of sixty-five year old woman is heinous). He next asserts that the underlying felony of sexual battery may not be used in aggravation. Florida's death penalty statute clearly allows the use of the underlying felony in aggravation, and that statute is constitutional. *See Proffitt v.*

3. *Huckaby v. State* also differs from the present case because the capital crime was rape of a child, for which imposition of death has since been declared unconstitutional. *Buford v. State*, 403 So.2d 943 (Fla.1981). There was also overwhelming evidence of defendant's mental illness in *Huckaby*.

Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Appellant contends that there was an improper doubling of aggravating circumstances when the judge found that the homicide was committed during a rape and was committed for pecuniary gain,[4] and then used these facts as parts of his heinous finding. But doubling has been disallowed when the underlying felony is robbery or burglary and is considered in addition to the aggravating factor of "committed for pecuniary gain." *See Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Appellant argues an improper consideration of nonstatutory aggravating factors when evidence was given concerning likelihood of rehabilitation and lack of remorse. But neither of these factors were considered in aggravation by the judge in his sentencing order and were accorded no weight in the sentencing process.

[6] Quince complains that certain additional factors should have been found in mitigation. He posits that because his record of past offenses is a juvenile record and too remote, he should have been found to have no significant prior criminal history. This Court has allowed juvenile records to dispel this mitigating circumstance when the circumstances warrant. *See Brooker v. State*, 397 So.2d 910 (Fla.1981). These juvenile offenses were not trivial, and included armed robbery and burglary. Quince pleads that his age of twenty years is a mitigating factor. Yet, as we stated in *Peek v. State*, there is no *per se* rule that pinpoints an age as a mitigating factor. *Id.* at 498. *Peek* in fact upheld the rejection of the age of nineteen as a mitigating factor. Nor does the record support appellant's claim that the trial judge limited his consideration to only statutory mitigating circumstances.

[7] Quince finally assails the formalities of the sentencing procedure. He complains that the state was permitted two closing arguments in violation of Florida Rule of Criminal Procedure 3.780(c).[5] The record establishes, however, that both sides had an equal opportunity for argument. The appellant did not make a definite objection to the allowance of two arguments for both sides, and therefore waived this error. *See Clark v. State*, 363 So.2d 331 (Fla.1978); *State v. Jones*, 204 So.2d 515 (Fla.1967).

[8] Quince's final argument is that a general sentence was improperly imposed on him for two separate offenses, violating the dictates of *Dorfman v. State*, 351 So.2d 954 (Fla.1977). General sentences are also prohibited by statute. § 775.021(4), Fla. Stat. (1979). Although appellant is technically quite correct in asserting the trial judge was in error in imposing such a general sentence, and we must disapprove the practice, we cannot say that Quince's sentence is similar to that involved in *Dorfman*. The death sentence Quince received could only have been imposed for the murder he committed, not for the burglary. If we had vacated the murder conviction, the death sentence would necessarily have fallen. Thus, we face none of the "inscrutability" created by the general sentence in *Dorfman*. *Id.* at 957. Second, since death is deemed the proper penalty, concerns that a general sentence interferes with the rehabilitative process are moot. *See Dorfman*, 351 So.2d at 955 n. 7. We fail to see the harm caused to appellant by this error since he stands only to lose on resentencing, in light of our approval of the death penalty.

Although each murder conviction and death sentence presents amazingly unique circumstances, we find that death is the justifiable punishment in light of the existence of three aggravating factors and one mitigating factor, and that such a heavy penalty is proportionate to those meted out in similar cases. *See, e.g., Brooker v. State; McCrae v. State*, 395 So.2d 1145 (Fla.1980); *Peek v. State*.

4. The appellant confessed both to the burglary and rape of the victim, and could hardly contest that these factors did not exist beyond a reasonable doubt.

5. "Both the state and the defendant will be given an equal opportunity for argument, each being allowed one argument. The state will present argument first."

IN THE SUPREME COURT OF FLORIDA

CASE NO. 59,954

KENNETH DARCELL QUINCE,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

MOTION FOR REHEARING

The Appellant, by his undersigned counsel, and pursuant to Rule 9.330, Florida Rules of Appellate Procedure, moves this Court for a rehearing in the above-styled cause. As grounds for the rehearing, the Appellant suggests that this Court has overlooked or misapprehended the following points of law or fact:

1. On page 2 of the slip opinion, this Court states that the record supports that "the exact degree of [Quince's] mental impairment could not be conclusively established" and that "[f]our of the five experts that examined Quince found his mental condition did not warrant application of mitigating factors concerned with mental capacity." However, it must be noted, and this Court has apparently overlooked the fact that only two experts were asked to examine the defendant for potential mitigating circumstances, (R 5-6, 7-8, 13-14) and only Dr. McMillan performed specific tests for this purpose. (T 115, 158) The two experts who examined Quince for mental impairment agreed that Quince was mentally retarded, and was "not functioning with all his marbles." (R 57; T 144, 157-158) Even the state's psychiatrist agreed that Quince was of below normal intelligence, functioning in the "dull-normal" range. (R 54; T 111, 128-129) Thus, contrary to this Court's opinion, the record does show Quince's exact degree of mental impairment.

APP. 2

The defendant's dull-normal, borderline retarded intelligence is surely a mitigating factor, either under Section 921.141(6)(f), Florida Statutes (1979), or else as a non-statutory mitigating factor. Moreover, the Court has misapprehended the reports of Drs. Rossario and Carrera. These psychiatrists did not find, as erroneously stated in the opinion, that Quince's mental condition did not warrant application of mitigating factors, since their reports and opinions were concerned solely with Quince's competence to stand trial and his sanity. Nonetheless, Dr. Rossario did indicate in his report that Quince's "judgement is markedly impaired...." (R 55)

Thus, this Court has overlooked and/or misapprehended the psychiatric reports conclusively showing, contrary to the trial judge's findings and this Court's opinion, that the mitigating factors (statutory and non-statutory) concerned with mental capacity are entitled to great weight which outweigh any aggravating factors.

2. Next, this Court in stating at slip opinion page 3, "Nor is this a case in which the trial judge considered matters he should not have," has overlooked the fact that the trial court allowed testimony, over defense objections, as to Quince's lack of remorse (T 56), and, in fact, personally elicited testimony concerning the possibility of Quince's rehabilitation. (T 148) See also slip opinion, at page 5. This non-statutory evidence was improperly elicited, admitted, and therefore presumably considered by the trial judge. See Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); Riley v. State, 366 So.2d 19 (Fla. 1978); Miller v. State, 373 So.2d 882 (Fla. 1979). The defendant's sentence was therefore impermissibly imposed in violation of Article I, Sections 9 and 17 of the Florida Constitution, and the Eighth and Fourteenth Amendments to the Constitution of the United States.

3. This Court, in its opinion at pages 3-4 exhibits a recent change in its sentence review function, claiming that this Court will no longer weigh or reevaluate evidence concerning aggravating or mitigating factors in comparison with prior decisions. This holding overlooks the mandate of State v. Dixon, 283 So.2d 1, 8 and 10 (Fla. 1973), Songer v. State, 322 So.2d 481, 484 (Fla. 1975), and Proffitt v. Florida, 428 U.S. 242 (1976), to determine independently whether the imposition of the ultimate penalty is warranted. As the Supreme Court of the United States noted in Proffitt, 428 U.S. at 252-253:

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." Songer v. State, 322 So.2d 481, 484 (1975). See also Sullivan v. State, 303 So.2d 632, 637 (1974)

This Court's change from its independent sentence review responsibilities, overlooks these decisions and renders Florida's death penalty unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution since the discretion of juries and judges is no longer controlled and channeled, and the penalty is being imposed and affirmed in an arbitrary and capricious manner.

4. In affirming the finding of heinous, atrocious, or creul, this Court has overlooked the more gruesome facts of Halliwell v. State, 323 So.2d 557 (Fla. 1975); Burch v. State, 343 So.2d 831 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Jones v. State, 332 So.2d 615 (Fla. 1976); and other cases in which this Court has found this aggravating circumstance to be lacking. In citing Peek v. State, 395 So.2d 492 (Fla. 1980), as a similarly heinous case, this Court overlooks the fact that the extremes present in Peek were simply not

present in the instant case; there were no crushed ribs nor the degree of suffering which was present in Peek. The victim in the instant case was not severely beaten, but was bruised on her arms only from striking the defendant. She was sexually assaulted when she was unconscious. (R 54) Additionally, the Court has overlooked the fact that any "heinousness" was caused by Quince's mental retardation and impairment. (T 144, 147-149) See Huckaby v. State, 343 So.2d 29, 34 (Fla. 1977); Miller v. State, 373 So.2d 882, 886 (Fla. 1979).

5. This Court, in rejecting Appellant's "doubling" argument states at pages 4-5 that doubling has only been disallowed when the underlying felony of robbery is considered in addition to the aggravating factor of "committed for pecuniary gain." This holding overlooks the decision of Clark v. State, 379 So.2d 97 (Fla. 1980), wherein an improper doubling was found by consideration of both factors of "for purpose of avoiding or preventing a lawful arrest" and "to disrupt or hinder a governmental function." See also Maggard v. State, 399 So.2d 973, 977 (Fla. 1981), wherein the Court found an improper doubling of burglary and pecuniary gain. The Court's opinion has misapprehended the "doubling" argument here. Appellant contended that the trial judge, in finding the sexual battery and burglary as aggravating circumstances, should not also have been allowed to refer to these factors in support of his finding of heinous, atrocious, or cruel. To do so violates Provence v. State, 337 So.2d 783, 786 (Fla. 1976). By using the fact of the sexual battery to make the crime heinous, and by using the burglary to make the killing heinous, the judge improperly referred to the same aspects of the defendant's crime to find three aggravating factors rather than two. The finding of heinous, atrocious, or cruel must be stricken as an improper doubling.

6. The Court, in rejecting the defendant's age of twenty as a mitigating factor, overlooks the cases of King v. State, 340 So.2d 315 (Fla. 1980) (age 23); Mikenas v. State, 367 So.2d 606 (Fla. 1978) (age 22); Hoy v. State, 353 So.2d 826 (Fla. 1977) (age 22); and Hallman v. State, 305 So.2d 180 (Fla. 1974) (age 23), wherein older ages in similar cases have been considered as mitigating factors. This Court also overlooked the fact that Quince's age can be coupled with the fact of his "dull-normal" intelligence to find a strong mitigating factor as was the case in Meeks v. State, 336 So.2d 1142 (Fla. 1976).

7. Finally, this Court's opinion overlooks the strong non-statutory mitigating factors of the defendant's tough personal and family life as argued at page 17 of the initial brief which factors were quite similar to those justifying a reversal to a life sentence in Neary v. State, 384 So.2d 881 (Fla. 1980). To overlook these mitigating factors renders the defendant's sentence unconstitutional under the rationale of Lockett v. Ohio, 438 U.S. 586 (1978), and under the comparative review standards required by Proffitt v. Florida, supra.

WHEREFORE, the appellant respectfully requests that this Honorable Court grant this motion for rehearing, withdraw the March 4th opinion in this cause, and reverse the case for imposition of a life sentence.

Respectfully submitted,

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Jim Smith, Attorney General, in his basket at the Fifth District Court of Appeal and mailed to: Mr. Kenneth D. Quince, Inmate No. 075812, Florida State Prison, P. O. Box 747, Starke, FL 32091 on this 17th day of March, 1982.

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

KENNETH DARCELL QUINCE, Appellant,	)	
vs.	)	CASE NO. 59,954
STATE OF FLORIDA, Appellee.	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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APP. 3

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IN THE SUPREME COURT OF FLORIDA

KENNETH DARCELL QUINCE, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 59,954

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

In this brief, the following symbols will be used:

"R" - Record on Appeal

"T" - Transcript of the Sentencing Hearing

"SR" - Supplemental Record on Appeal (Plea Hearing) filed on April 29, 1981

STATEMENT OF THE CASE

On January 17, 1980, the grand jury returned an indictment charging the defendant with first degree murder of Francis Bowdoin, sexual battery of Frances Bowdoin, and burglary of an occupied dwelling with an assault therein of the residence of Frances Bowdoin, stemming from an incident on December 28, 1979. (R1) Following mental examinations which, according to the psychiatrists, revealed that Quince was legally sane at the time of the offense and was competent to stand trial, the defendant entered pleas of guilty to Count I (first degree felony murder committed during the course of the sexual battery) and Count III (burglary). (R4,5-8,48-56;SR5-17) Count II, the sexual battery charge, was dismissed by the court, upon motion by the defense, because it was the underlying felony of the felony murder. (R11-12,29;SR18-19) Pursuant to the plea negotiations, the defendant waived a sentencing jury, the court to hold a hearing for aggravating and mitigating evidence to be presented to the judge alone. (SR6-8)

A penalty phase hearing before the judge alone was held on October 20, 1980. (T1-208) On October 21, 1981, based upon the evidence and arguments presented at the hearing and based upon the pre-sentence investigation, the trial court imposed a sentence of death upon Kenneth Quince. (R30;T210-212) In its findings of fact, the court found as

aggravating circumstances: (d) the murder was committed while the defendant was committing rape; (f) the murder was committed for pecuniary gain; and (h) the murder was especially heinous, atrocious, or cruel because it involved a strangulation during a burglary and sexual battery and because "while the deceased was lying on the floor, presumably dead or unconscious, the Defendant stepped on her stomach." (R18-19) Although giving it little weight, the trial court found the existence of mitigating factor (f), the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R19-20) The trial court rejected (a) lack of a significant prior criminal history based upon the defendant's juvenile charges (the most recent of which was five years old), and (g) the defendant's age of twenty years old as mitigating factors. (R19-20,25)

Notice of appeal was filed on November 17, 1980. (R36) This appeal follows.

STATEMENT OF THE FACTS

The following facts were elicited at the penalty phase hearing before the judge:

On December 30, 1979, Detective Larry Lewis was dispatched to a house in Daytona Beach regarding a suspicious death. (T11) Upon arriving at the scene, he found the body of Frances Bowdoin, age 82, lying on the floor of her bedroom. (T12-13) The detective observed dried blood coming from the deceased's nose, bruises on her forearm, a bruise under her ear, and a small abrasion on her pelvic area. (T14,15,24-26)

The medical examiner later determined that the cause of death was suffocation by strangulation. (T90,92) Dr. Botting also noted two lacerations on the victim's head which could have been caused either by a sharp-edged instrument or by the sharp edge of furniture on which she may have fallen. (T80-81) These lacerations would have been sufficient to cause unconsciousness. (T91) Because of a bruise to the vaginal area of the victim, the medical examiner concluded that the sexual assault occurred prior to death, but the doctor could not opine whether the victim was conscious or unconscious at the time. (T91,92) At the scene, the detective had obtained several latent fingerprints from the window area which he had concluded was the point of entry of the intruder. (T27) The detective later compared the latent prints with those of the suspect, Kenneth Quince. (T28,35) Detective Lewis made a positive comparison. (T28,35)

On the basis of this fingerprint identification, Detective Lewis arrested Quince at his home, approximately two blocks from the Bowdoin residence. (T35-36) Quince was taken to the police headquarters, where he signed a waiver of his constitutional rights. (T36) After the officer explained to Quince that the arrest was in reference to a burglary, the defendant denied knowledge of the incident. (T36-37)

The detective asked Quince if he knew where the house in question was, the defendant responding that he had cut the yard for the lady five or six years ago. (T42) After repeated questioning as to whether the defendant had been there more recently, Quince finally told the detective that he had been at the house. (T43) Quince told Detective Lewis that he had burglarized the house, believing no one to be home. (T44) While inside looking for valuables, Quince told the detective, Frances Bowdoin came to the bedroom door and the two spotted each other. (T44) The victim closed her bedroom door and Quince, after trying unsuccessfully a couple of times, managed to force the door open. (T44) The force of the opening door knocked Ms. Bowdoin to the floor. (T44) She stood back up and started to scream, whereupon the defendant, trying to quiet her, grabbed her by the throat, shook her for a while, and pushed her to the floor. (T44) The defendant continued to look for valuables, taking a tape player, a radio, and a ring which he later pawned at three pawn shops. (T44,51) (Detective Lewis later recovered these items at the pawn

to leave, he stepped on the deceased's stomach. (T51)

Detective Lewis questioned the defendant concerning a sexual assault which the police suspected had occurred. (T45-46) Quince denied that any sexual battery had occurred, but, a month later, after the detective confronted him with laboratory test results, the defendant admitted with some embarrassment to the sexual battery, without giving any further details. (T51-53,57-58) (Quince later told psychiatrists that, after pushing the deceased to the floor, and after she was unconscious, her nightgown rode up around her waist, and, becoming sexually excited, he raped her. [R54])

Dr. Ann McMillan, a psychologist who had been appointed by the court to examine Quince specifically for the purpose of determining whether any mental mitigating factors were present, testified that Quince suffered from borderline mental retardation and had severe specific learning disabilities and impairment. (R57;T144) Dr. McMillan told the court that the defendant had a significantly lower mental age and would act more like an eleven year old than an adult. (T147) Quince, who had a judgment disability and was unable to perceive the consequences of his actions, merely reacted to the circumstances of the instant situation, rather than acting through step-by-step planning. (T144,147-149) The homicide and sexual battery, therefore, were committed by a defendant whose capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (T144-145)

The other psychiatrists, all but one of whom were appointed solely to determine Quince's competency to stand trial and sanity, agreed that Quince was of below normal intelligence, in the "dull-normal" range, or borderline mentally retarded. (R54;T111,128-129,157-158) Not having performed any intelligence or personality tests on the defendant, they opined that the mitigating factor of impaired capacity was not present. (T113-115,158,164-165) Dr. Stern, however, stated that Quince "was not functioning with all his marbles" and Quince's borderline intelligence, could, in itself, constitute somewhat of a mental impairment. (T158, 162-163) Dr. Rossario's report indicates that the defendant's judgment is "markedly impaired." (R55)

During the penalty phase hearing the prosecutor elicited from Detective Lewis, over defense counsel's initial objection, that, in Lewis' opinion, the defendant exhibited no remorse. (T56) Detective Lewis did admit, however, that he had never asked Quince how he felt about the incident. (T57) Furthermore, in the pre-sentence investigation, Quince was quoted as saying, "I do have feelings about what happened but it's too late now to say anything more." (R24)

Also during the penalty phase hearing, the trial court initiated questioning about the prospects of rehabilitation for the defendant. (T148) Dr. McMillan stated that Quince, due to his mental condition, would require lifelong supervision. (T148) Dr. Stern testified for the defense that Quince could be rehabilitated. (T165)

During the penalty phase closing argument, the prosecutor was allowed both opening and rebuttal. (T204) In its argument, the state advanced lack of remorse and the possibility of parole as grounds for imposing the sentence of death as opposed to life. (T174,206)

The pre-sentence investigation reveals that the defendant was part of a very large family, having seven living brothers and sisters. (R25) Quince lived with his mother, a custodian at a school, and four sisters. (R26) Quince's father died in an automobile accident when Quince was five years old. (R25) Quince attended school through the tenth grade, receiving very poor grades. (R26,54;SR10) The defendant admitted in the pre-sentence investigation and to the psychiatrists that he drank and smoked marijuana heavily, including the day of the offense. (R26,54,55) Quince began drinking when he was thirteen years old and began the use of drugs at age fifteen. (R54,56)

The trial court did not consider any of the above-stated background of the defendant as non-statutory mitigating factors. (R19-20) The state had argued at the hearing, in an objection to defense examination of a psychiatrist, that the questions were not what the statute requires. (T160,162) The court, in ruling on the objection, told defense counsel to focus on the statutory aggravating and mitigating factors. (T163)

ARGUMENT

POINT I

APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED IN VIOLATION OF THE STATUTE, ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. Introduction

The defendant, upon advice of counsel, pleaded guilty to first degree murder and waived the recommendation of a sentencing jury. (SR5-17) The trial judge, acting, therefore, without the benefit of a sentencing jury, heard testimony at a penalty phase hearing and considered a pre-sentence investigation and psychiatric reports in order to determine the sentence he would impose. (R18) Following the hearing, the trial court sentenced Kenneth Darcell Quince to die in the electric chair for the first degree murder conviction. (R30;T210-212) In so doing, the judge found three aggravating circumstances: (d) the crime was committed while the defendant was engaged in a sexual battery; (f) the crime was committed for pecuniary gain; and (h) the crime was especially heinous, atrocious, or cruel. (R18-19) The court ruled that one mitigating circumstance was present, i.e., (f) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the essential requirements of law was substantially impaired. However,

the court ruled that this factor had little weight. (R19-20)

The sentence of death imposed upon Kenneth Quince must be vacated. The court found improper aggravating circumstances, considered testimony on non-statutory aggravating evidence, failed to give substantial weight to or consider highly relevant and appropriate mitigating factors, and applied incorrect standards for the mitigation, limiting his consideration to the statutory mitigating circumstances. A proper weighing of the applicable circumstances should have resulted in a life sentence.

B. Mitigating Factors, Not Found By The Trial Court, Were Present And The Mitigating Factor Which Was Found Was Given Improper Weight.

Evidence was presented both at the penalty hearing and in the pre-sentence investigation and in the psychiatric reports which clearly established strong statutory and non-statutory mitigating circumstances. A review of these mitigating factors clearly demonstrates that any proper aggravating factors were outweighed by these circumstances. This evidence included, but is not limited to, the following factors.

The defendant lacked a significant history of prior criminal activity. §921.141(6)(a), Fla. Stat. (1979). Particularized consideration of all relevant aspects of a defendant's character and record is mandated before the imposition of the extreme penalty. Woodson v. North Carolina, 428 U. S. 280, 305 (1976). Individualized sentencing

determinations are necessary to meet the unique need for reliability attendant in the determination of whether death is the appropriate punishment in a specific case. Id. See also Lockett v. Ohio, 438 U. S. 586, 605 (1978). To ignore such considerations in fixing the ultimate punishment would be tantamount to treating persons convicted of first degree murder "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U. S. at 304.

In the instant case, the trial court relied on the defendant's juvenile court record in rejecting the factor of no prior significant criminal history. (R19; Volume II of Record;T4-9) In considering this factor, however, the remoteness in time of the prior juvenile activity is one of the "relevant aspects of Appellant's character and record" which should have been considered by the sentencing judge. Woodson v. North Carolina, supra; Lockett v. Ohio, supra. The last entry on the defendant's juvenile record occurred in 1975, five years prior to the instant case. (R25) The only arrest which the defendant had as an adult was on a charge of loitering and prowling. (R25) Surely, due to the remoteness in time of the juvenile activity, the less significant this prior criminal activity has become. The "criminal history" of the defendant was so remote in time as to have little or no relevance to the determination of this factor at all. Accordingly, the trial

court should have found the lack of a significant criminal history and should have considered this mitigating circumstance in the weighing process.

The trial judge also erred in giving only little weight to Quince's impaired mental state under Section 921.141(6)(f), Florida Statutes. In State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), this Court interpreted this mitigating circumstance, stating:

> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance.... Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

Applying this definition to the evidence presented in the instant case, it is clear that this mitigating circumstance must be given strong weight. The uncontradicted evidence establishes that Quince was of below normal intelligence, in the "dull-normal" range or borderline mentally retarded. (R54,57;T111,128-129,144,157-158) Dr. McMillan testified that the defendant suffered from severe specific learning disabilities and impairment and had a mental age of only eleven years old. (T144,147)

In Ross v. State, 386 So.2d 1191, 1196 (Fla. 1980), which this Court reversed for resentencing, the trial court had found the defendant's limited intellectual capacity to be a mitigating factor on evidence similar to that presented in the instant case. Also, in Burch v. State, 343 So.2d 831

(Fla. 1977), this Court vacated a sentence of death primarily on the basis of this mitigating factor. See also Jones v. State, 332 So.2d 615, 619 (Fla. 1976). Quince was, according to one psychiatrist, "not functioning with all his marbles" and his borderline intelligence could, in itself, constitute a mental impairment. (T158,162-163) The defendant's judgment was markedly impaired (R55), and Quince was acting under a substantially impaired capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law. (T144-145)

Kenneth Quince, who had a judgment disability and was unable to perceive the consequences of his actions, would do "more reacting rather than step-by-step planning." (T144,147) Dr. McMillan compared Quince's actions in this case to a child who is home alone when he spies a pack of matches; the child "did not mean to play with [the matches], so he saw them, so he did. It is more something that is, that it was there, so you do it without giving any great thought to consequences." (T147-148) Dr. McMillan used the same standard to describe the reason for the sexual battery:

> The same standard would be, she was there and so he did it, with the biological drive and the abnormal personality and intelligence that we are talking about. (T149)

It is submitted that this case is a classic example of substantial mental impairment of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the essential requirements of law. See Huckaby v. State, 343 So.2d 29 (Fla. 1977), and Shue v. State, 366 So.2d 387 (Fla. 1978). Counsel can conceive of no stronger situation in which this factor would apply.

Additionally, Quince's heavy consumption of alcohol and marijuana, on a regular basis and on the day of the incident increased his mental impairment. (R26,54-56;T144-145) As Justice Ervin noted in his dissenting opinion in Gardner v. State, 313 So.2d 675, 679 (Fla. 1975) (death sentence later reversed by the United States Supreme Court and, upon remand, the defendant was sentenced to life imprisonment), the more enlightened perspective on heavy alcohol and drug use is that it is no longer considered simply an emotional weakness, but rather forms of diseases, which, like other physical and mental ailments, can cause aberrant behavior and require treatment. In Jones v. State, supra at 619, wherein evidence indicated that the defendant had consumed large amounts of alcohol, this Court approved a finding of mental mitigating factors, holding that extreme alcohol usage can be a basis for mitigating punishment. See also Gardner v. Florida, 430 U. S. 349, 352 (1977) (wherein intoxication was held to establish mental mitigating circumstances).

Kenneth Quince suffered from impaired mental capacity due to his low intelligence and judgment disability. Standing alone, these defects produce a strong mitigating circumstance under Section 921.141(6)(f), Florida Statutes. When coupled with Quince's drinking and drug problem, this factor demands even more weight. The court, in finding the presence of this circumstance, should have given it great weight, rather than little weight. Because of this strong factor, a life sentence is clearly called for.

Another factor to be found in mitigation is the defendant's age. The legislative purpose behind this circumstance is to provide for consideration of the age of the defendant "whether youthful, middle aged, or aged -- in mitigation of the commission of an aggravated capital crime." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). There is no automatic age, then, above which this mitigating factor does not apply. As the trial court correctly noted, each case must rest on its own facts surrounding the totality of the defendant's character and background. (R20) See Lockett v. Ohio, 438 U. S. 586 (1978). But this is as far as the trial court's correctness went. While stating that it had read this Court's decisions concerning age as a mitigating factor, the trial court declined to distinguish those cases in which a similar age was found to be mitigating and to divulge its reasons for rejecting Quince's age as mitigation.

At the time of the incident, Quince was twenty years old. (R20,23) This Court has recognized youthful age in mitigation in Mikenas v. State, 367 So.2d 606 (Fla. 1978)

and Hoy v. State, 353 So.2d 826 (Fla. 1977). Both of these cases involved defendants who were older than Quince; Hoy and Mikenas were twenty-two years of age. Moreover, in King v. State, 390 So.2d 315 (Fla. 1980), and in Hallman v. State, 305 So.2d 180 (Fla. 1974), this Court found age twenty-three as a mitigating circumstance. Moreover, when coupled with the fact that the defendant had a mental age of eleven, was borderline mentally retarded, and was of "dull-normal intelligence," Quince's age becomes an even stronger mitigating factor. See Meeks v. State, 336 So.2d 1142 (Fla. 1976). Thus, the age of Quince is certainly established as a strong mitigating circumstance; the trial court erred in rejecting it.

Furthermore, the trial judge manifestly overlooked and failed to consider and refute other, non-statutory mitigating circumstances which were established by Quince. It appears that this was done in the mistaken belief that the law precluded consideration of non-statutory factors in mitigation. (See R160,162-163, where the trial court, ruling on the state's objection that questions propounded to psychiatrists by the defense were not what the statute requires, told defense counsel to focus on the statutory aggravating and mitigating factors.) This interpretation is clearly erroneous and unconstitutional under Lockett v. Ohio, 438 U. S. 586 (1978), and Songer v. State, 365 So.2d 696 (Fla. 1978). The trial court's limitation of its consideration to statutory mitigating factors requires reversal of the death sentence. See Perry v. State, ____ So.2d ____,

1981 FLW 18 (Fla.Sup.Ct. Case No. 53,003, 12/18/80).

Additional non-statutory factors calling for Kenneth Quince to live include the evidence that Quince had had a tough family and personal life. Quince grew up without a father, who was killed in an automobile accident when Kenneth was five years old. (R25) He was then reared by his mother, who had to work outside the home as a custodian, and lived in a small three-bedroom house along with his seven brothers and sisters. (R25-26) In Neary v. State, 384 So.2d 881 (Fla. 1980), evidence of this type was considered in mitigation, justifying a reversal of a death sentence. Quince, especially due to his extreme learning disabilities, had problems with his schooling, receiving very poor grades, finally giving up on school after the tenth grade. (R26,54; SR10) Similar factors were also considered in Neary v. State, supra. Also, the court should have considered the fact that the defendant cooperated with the police and entered a plea of guilty to the offense, admitting his culpability.

These non-statutory factors which the trial court failed to consider or rebut in its factual findings, together with the strong statutory mitigating circumstances weigh heavily against any aggravating factors and call for the reduction of Quince's sentence to life imprisonment.

C. The Trial Judge Considered Inappropriate Aggravating Circumstances

It is well established that aggravating circumstances must be proven beyond a reasonable doubt. Williams v. State,

386 So.2d 538, 542 (Fla. 1980); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The state has failed in this burden with regard to the aggravating factors found by the trial court. The court's findings of fact do not support these circumstances and cannot provide the basis for the sentence of death.

The trial court found, as an aggravating circumstance, that the crime was especially heinous, atrocious, or cruel. §921.141(5)(h), Fla. Stat. Contrary to and notwithstanding the trial court's findings, the facts sub judice fail to support this finding.

This Court has defined this aggravating circumstance in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973):

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that the aggravating circumstance only apply to crimes especially heinous, atrocious or cruel.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, supra at 9.

Following the above definition, the facts of the homicide sub judice fail to support a finding of this circumstance. While it may be true that death was not instantaneous, the medical examiner testified that upon receiving the lacerations on the top of her head (Quince told police that Ms. Bowdoin had fallen or had been pushed down, striking her head), the victim could very well have lost consciousness. (T91) After losing consciousness, she would have felt no pain whatsoever.

Additionally, according to Quince's statements (which were never disproven beyond a reasonable doubt), he engaged in sexual intercourse only after the victim was unconscious. (R54;T91-92) Bowdoin would therefore not have been aware of the sexual battery. Similarly, as admitted by the court in its written findings, the defendant stepped on the victim's stomach after unconsciousness or death. (R19) Since any wounds or actions occurring after death are irrelevant to this aggravating circumstance, Halliwell v. State, 323 So.2d 557 (Fla. 1975), this factor cannot be used to support heinousness of the offense. Because most of the actions occurred after unconsciousness or death, the homicide was not "necessarily torturous to the victim" as is required by Dixon and Tedder, supra.

It is the duty of this Court to review the case in light of other decisions and determine whether or not the punishment is too great." State v. Dixon, supra at 10; McCaskill v. State, 344 So.2d 1276, 1278-1279 (Fla. 1977).

A comparison to other cases wherein this Court has reduced death sentences to life imprisonment reveals that the instant crime was no more shocking than the norm of capital felonies.

In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the defendant beat the victim's skull with lethal blows from a 19-inch breaker bar and then continued beating, bruising, and cutting the victim's body with the metal bar after the first fatal injuries to the brain. The Halliwell crime is surely more brutal than that of the instant case, yet this Court found in Halliwell's conduct "nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court." Halliwell, 323 So.2d at 561.

Similarly, the cases of Burch v. State, 343 So.2d 831 (Fla. 1977) (36 stab wounds during frenzied attack); Chambers v. State, 339 So.2d 204 (Fla. 1976) (severely beat girlfriend to death -- victim bruised over her entire head and legs, had a deep gash under her left ear; her face was unrecognizable, and she had several internal injuries); and Jones v. State, 332 So.2d 615 (Fla. 1976) (38 "significant" lacerations on rape victim), involve similar or more gruesome killings. In each of these cases, however, this Court has vacated the death sentences. The appellant's death sentence must likewise be vacated. Were the impositions of life sentences in these and other similar or more heinous cases to be ignored, Florida's death penalty statute could not be upheld under

the requirements of Proffitt v. Florida, 428 U. S. 242 (1976), and Furman v. Georgia, 408 U. S. 238 (1972). See also Godfrey v. Georgia, ____ U. S. ____, 64 L.Ed.2d 398 (1980).

To support his finding that the homicide was heinous, atrocious, or cruel, the trial judge simply recites the actions and injuries concerning the sexual battery and burglary. First, this would obviously be an improper doubling with findings (d) the homicide was committed during the course of a rape, and (f) the homicide was committed for pecuniary gain. See Provence v. State, 337 So.2d 783, 786 (Fla. 1976); Clark v. State, 379 So.2d 97, 104 (Fla. 1979). The factual basis for the heinous, atrocious, or cruel circumstance refers to the same aspect of the defendant's crime as does the sexual battery and as does the pecuniary gain. Therefore, circumstances (d) and (f) cannot be combined and recycled to form circumstance (h) heinous, atrocious, or cruel.

Additionally, if this Court does find sufficient factual basis for the aggravating factor of heinous, atrocious, or cruel, the finding is still improper because the judge failed to consider and weigh the fact that the perceived heinousness of the offense was directly caused by Quince's severe mental problems. This Court has recognized the causal relationship between these aggravating and mitigating circumstances in Huckaby v. State, 343 So.2d 29 (Fla. 1977), and in Miller v. State, 373 So.2d 882 (Fla. 1979).

In Huckaby v. State, supra at 34, this Court held that although the aggravating and mitigating circumstances were equal in number, the mitigating circumstances (which had not been found by the trial judge) must outweigh those in aggravation because the heinous nature of the crime was the direct consequence of the defendant's mental problems. Similarly, in Miller v. State, supra at 886, this Court again noted that the heinous nature of the offense resulted from the defendant's mental impairment. See also Jones v. State, 332 So.2d 615, 619 (Fla. 1976).

The defendant's mental impairment in the instant case can clearly be seen as relating to the perceived heinousness of the offense. Quince did not plan what happened, he merely reacted. (T144,147) Like a child playing with matches, it was there so he did it without even thinking. (T147-149)

To be heinous, atrocious, or cruel, the injuries and killing must be done without pity, with indifference or enjoyment of the suffering of others. State v. Dixon, supra at 9. But because of his mental impairment, it was impossible for Quince to commit this offense with any meanness. Quince's mental incapacity can be compared to that of Lennie, the protagonist in John Steinbeck's Of Mice and Men. In the story, Lennie, who is borderline mentally retarded, kills the wife of Curley, a co-worker, because she screamed while he was alone with her and he panicked. Upon discovering her body, Lennie's co-workers discuss Lennie's mental problems and what should be done:

> Candy asked, "What we gonna do now, George? What we gonna do now?"
>
> George was a long time in answering. "Guess....we gotta tell the....guys. I guess we gotta get 'im an' lock 'im up...." And he tried to reassure himself. "Maybe they'll lock 'im up an' be nice to 'im."
>
> * * *
>
> Candy said, "He's such a nice fella. I didn' think he'd do nothing like this."
>
> George still stared at Curley's wife. "Lennie never done it in meanness," he said. "All the time he done bad things, but he never done one of 'em mean." Steinbeck, Of Mice and Men, Bantam Books, Inc. (1955), pp. 103-104.

Similarly, due to his mental impairment, Quince committed the acts out of reaction to the situation; he "never done it in meanness."

"Heinous, atrocious, or cruel" is not present in the instant case. Kenneth Quince does not deserve the death penalty; his sentence should be vacated to life imprisonment.

The aggravating factor of "during the commission of the sexual battery" must also fall. The use of the underlying felony as an aggravating circumstance would apply to every felony-murder situation and defeat the function of the statutory aggravating circumstances to confine and channel capital sentencing discretion, and so would violate Furman v. Georgia, 408 U. S. 238 (1972). Stated differently, appellant

case, the death sentence would be automatic for felony-murder. However, there are no guidelines provided by the statute for determining which felony-murder cases receive the death sentence and which do not. Certainly, all felony-murder cases do not, and constitutionally cannot, mandate the death sentence -- a mandatory death sentence would be invalid. E.g. Woodson v. North Carolina, supra. To uphold a death sentence simply because the offense for which it was imposed involved a sexual battery and murder would leave judges and juries with unfettered, unchanneled discretion, would provide no meaningful basis for distinguishing between those felony-murder cases which receive the ultimate penalty and those that receive life, and would thus render the Florida Statute arbitrary and capricious as applied. Cf. Proffitt v. Florida, 428 U. S. 242 (1976); Godfrey v. Georgia, ____ U. S. ____, 64 L.Ed.2d 398 (1980).

Applying such reasoning, the North Carolina Supreme Court invalidated the use of the underlying felony as an aggravating circumstance. State v. Cherry, 257 S.E. 2d 551 (N. C. 1979). The Cherry court found that the death penalty in a felony murder case would be disproportionately applied due to the "automatic" aggravating circumstance, and thus struck the use of the underlying felony as an aggravating circumstance. Thus, this aggravating factor cannot stand.

Finally, Quince's sentence is illegal because improper and non-statutory aggravating factors were presented to the judge at the penalty hearing; in fact, one was even

elicited by the trial judge. The prosecutor elicited from a police detective that, in his opinion, the defendant had shown no remorse. (T56) (But see R24.) The Court inquired of a psychologist as to Quince's chances for rehabilitation; and, upon hearing the answer, the prosecutor argued that Quince should not be given the chance to one day be paroled. (T148,206) It is clearly recognized that evidence of non-statutory aggravating circumstances cannot constitutionally be admitted and considered by either a jury or a judge, even without objection from defense counsel. Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); Purdy v. State, 343 So.2d 4, 6 (Fla. 1977); Provence v. State, 337 So.2d 783, 786 (Fla. 1976). Therefore, neither lack of remorse, Riley v. State, 366 So.2d 19 (Fla. 1978), nor the possibility of parole of a non-rehabilitative person, Miller v. State, 373 So.2d 882 (Fla. 1979), may be considered. To elicit this testimony was error requiring reversal of the defendant's sentence.

Accordingly, Quince's death sentence was based in substantial part on improper and unsupported aggravated factors. In addition, the sentencing judge ignored the strong and material mitigating factors. These errors are not harmless; the judge utilized these erroneous findings in sentencing Quince to the violent termination of his life. Kenneth Quince's death sentence must be vacated and remanded for the entry of a life sentence.

POINT II

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TWO ARGUMENTS IN THE PENALTY PHASE OF APPELLANT'S TRIAL, IN VIOLATION OF THE MANDATORY PROVISIONS OF FLA.R.CRIM.P. 3.780.

Rule 3.780, Florida Rules of Criminal Procedure, states that:

> (c) Both the state and the defendant will be given an equal opportunity for argument, each being allowed one argument. The state will present argument first. (emphasis added)

In the instant case, the prosecutor was permitted to rebut defense counsel's argument to the judge. (T204) Defense counsel initially objected to the procedure, but was assured by the court that he would be able to rebut, also. (T204)

In an analogous situation, concerning closing arguments during the guilt phase of a trial pursuant to Rule 3.250, Florida Rules of Criminal Procedure, the courts have held that failure to follow the required procedure concerning arguments is reversible error which cannot be found harmless. E.g., Birge v. State, 92 So.2d 819, 821-822 (Fla. 1957); Raysor v. State, 272 So.2d 867,869 (Fla. 4th DCA 1973); Gari v. State, 364 So.2d 766, 767 (Fla. 2d DCA 1978). In Raysor, supra at 869, the court stated:

> In further extension, we are at a loss as a practical matter to know just how any criminal defendant could in fact make a demonstration of error because of the refusal of the trial court to follow the dictates of the Rule. It is inherent in the procedure,

> as all acquainted with trial tactics know, that the right to address the jury finally is a fundamental advantage which simply speaks for itself.

Although there have been no decisions of this Court construing Fla.R.Crim.P. 3.780, the language of the rule is similar to that of Rule 3.250 in that it is mandatory in nature. [Gibson v. State, 351 So.2d 948 (Fla. 1977), is not dispositive of the issue since Gibson's trial occurred before the passage of Rule 3.780.] The uniqueness of the decision involved in the penalty phase of a capital trial and the relative interests at stake dictate that the rule be strictly followed.

As recognized by Florida courts it is difficult if not impossible for a defendant to demonstrate any specific prejudice as a result of being denied the final argument, and thus it is not required. Birge v. State, supra; Raysor v. State, supra. However, in the present case, a review of the prosecutor's final argument demonstrates that several of his improper arguments occurred during that portion. (T204-206) The error occurred in allowing the state the additional opportunity to rebut what defense counsel had said and in giving the state the opportunity to point out additional factors it had failed to argue during its first argument. This procedure violated the clear language of Rule 3.780 and mandates reversal of the defendant's death sentence for a new penalty trial.

POINT III

THE TRIAL COURT ERRED IN IMPOSING ONE GENERAL SENTENCE UPON THE DEFENDANT'S CONVICTIONS FOR FIRST DEGREE MURDER AND BURGLARY.

In the defendant's judgment and sentence, the trial court adjudicated the defendant guilty of both first degree murder and burglary. (R30) The court then proceeded to sentence the defendant to one death sentence. (R30)

This Court has held in Dorfman v. State, 351 So.2d 954,957 (Fla. 1977), that "general sentences are no longer proper and they may not be imposed by any trial court." A general sentence occurs when the trial court imposes only one sentence after a defendant has been convicted of several offenses. Carroll v. State, 351 So.2d 144, 147 (Fla. 1978). The defendant, receiving one death sentence for both offenses, thus has received an improper general sentence. See also Darden v. State, 306 So.2d 581 (Fla. 2d DCA 1975). The death sentence must be vacated and the case remanded for resentencing.

POINT IV

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statute and thus detailed briefing would be futile. However, appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors. Mullaney v. Wilbur, 421 U. S. 685 (1975).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980) (England, J. concurring).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, and limitations on consideration of and weight given to mitigating evidence and factors. See Lockett v. Ohio, 438 U. S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133,

1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore a cruel and unusual punishment.

Supreme Court of Florida

THURSDAY, MAY 27, 1982

KENNETH DARCELL QUINCE,	*	
Appellant,	*	CASE NO. 59,954
v.	*	Circuit Court No. 80-48-CC (Volusia)
STATE OF FLORIDA,	*	
Appellee.	*	

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

RECEIVED
MAY 28 1982
ATTORNEY GENERAL
DAYTONA BEACH, FLA.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By Tanya Carroll
Deputy Clerk

TC
cc: Hon. V. Y. Smith, Clerk
Hon. S. James Foxman, Judge

James R. Wulchak, Esquire
Shawn L. Briese, Esquire

APP. 4

IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO. 82-5096

KENNETH DARCELL QUINCE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

RESPONSE TO

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

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COUNSEL FOR RESPONDENT

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OPINION BELOW

The opinion Petitioner seeks to have this Court review is reported in Quince v. State, 414 So.2d 185 (Fla. 1982) (Appendix 1).

JURISDICTION

Respondent concedes that to the extent that the application of §921.141 Fla Stat. (1979) is drawn in question on the ground of the application being repugnant to the constitution, jurisdiction would properly vest pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner contends that U.S. Const. amend.VIII, XIV, §1 and §921.141 Fla. Stat. (1979) are involved.

STATEMENT OF THE CASE

Respondent hereby accepts Petitioner's statement of the case for the sole purpose of argument herein with the following additions:

The federal constitutional issue which Petitioner raises in the instant petition was not properly raised as a federal constitutional issue before nor passed upon by the Florida Supreme Court (See Reasons for Not Granting the Writ Section, infra).

REASONS FOR NOT GRANTING THE WRIT

The federal constitutional issue which Petitioner raises in the instant petition was not properly raised as a federal constitutional issue before nor passed upon by the Florida Supreme Court. While Petitioner raised such issue in his Motion for Rehearing (Appendix 2) he did not raise it in his Initial Brief (Appendix 3). Fla.R.App.P. 3.330(a) provides that a motion for rehearing shall state with particularity the points of law or fact which the court has overlooked or misapprehended. Implicit in the above statement is the fact that the initial presentation of a matter on rehearing is prohibited. Sarmiento v. State, 371 So.2d 1047 (Fla. 3d DCA 1979) (Affirmed State v. Sarmiento, 392 So.2d 643 (Fla. 1981)) and Delmonico v. State, 115 So.2d 368, (Fla. 1963). Thus, Petitioner's initial presentation of the federal constitutional issue, which he is presently raising, in his

Motion for Rehearing was prohibited; the Florida Supreme Court, in denying his motion (Appendix 4), did not rule on the merits of that particular point.

It was very early established that this Court will not decide federal constitutional issues raised before it for the first time on review of state court decisions. Cardinale v. Louisiana, 394 U.S.437, 89 S.Ct.1101 (1969). It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. Webb v. Webb, ___U.S.___, 101 S.Ct.1889 (1981). Thus, since Petitioner, in the present case, never raised the federal constitutional issue, which he is now attempting to raise, before the Florida Supreme Court in his Initial Brief and could not initially raise the issue in his Motion for Rehearing, this Court has no jurisdiction to decide the issue since the issue was not passed upon by the Florida Supreme Court.

Petitioner complains that the Florida Supreme Court's refusal to independently reweigh mitigating evidence makes his sentence constitutionally infirm in violation of U.S. Const. amend. VII,XIV, §1. This issue arose in the court's opinion when it dealt with Petitioner's assertion that the trial judge erred in giving only little weight to the sole mitigating factor found; substantial impairment of the capacity to appreciate the criminality of his act or to confirm his conduct to the requirements of law (§921.141(6)(f) Fla. Stat.(1979)). The Florida Supreme Court correctly noted that this is a case in which Petitioner disagrees with the weight that the trial judge accorded the mitigating factor. Mere disagreement with the weight to be given such evidence is an insufficient basis for challenging a sentence. Tibbs v. Florida, ___U.S.___, 102 S.Ct.2211 (1982).

This Court in Proffitt v. Florida, 428 U.S.242, 96 S.Ct. 2960 (1976) noted that §921.141 Fla. Stat. does not require the court to conduct any specific form of review. The Florida Supreme Court considers its function to be to guarantee that the aggravating and mitigating reasons present in one case will reach

a similar result to that reached under similar circumstances in another case... If a defendant is sentenced to die, this court can review that case in light of other decisions and determine whether or not the punishment is too great, citing State v. Dixon, 283 So.2d, (Fla. 1973).

This Court went on to note that the Florida capital sentencing procedures seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted", citing Songer v. State, 322 So.2d 481 (Fla. 1975) and Sullivan v. State, 303 So.2d 632 (Fla. 1974). See also McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Douglas v. State, 328 So.2d 18 (Fla. 1976); Alvord v. State, 322 So.2d 533 (Fla. 1975); and Lamadline v. State, 303 So.2d 17 (Fla. 1974).

The Florida Supreme Court in Harvard v. State, 375 So.2d 833 (Fla. 1977) held that when the sentence of death has been imposed, it is its responsibility to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate. It must also insure that punishment for murder is evenly applied so that similar homicides will draw similar penalties.

The court in Sireci v. State, 399 So.2d 964 (Fla. 1981) noted that findings of a judge, i.e., as to aggravating and mitigating circumstances, are factual matters which should not be disturbed unless there is an absence or lack of substantial competent evidence to support those findings. See also Smith v. State, 407 So.2d 894 (Fla. 1981) and Lucas v. State, 376 So.2d 1149 (Fla. 1979).

The court's role is not and should not be to cast aside the careful deliberation which the matter of sentence has already received by the jury and the trial judge, unless there has been material departure by either of them from their proper functions

prescribed by §921.141 Fla. Stat., or unless it appears that in view of other decisions concerning imposition of the death penalty the punishment is too great. Hargrave v. State, 366 So.2d 1 (Fla. 1978).

It is the court's responsibility to insure that the trial judge remains faithful to the dictates of §921.141 Fla. Stat. in the sentencing process. It is not the function of the court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court. Mikenas v. State, 367 So.2d 606 (Fla. 1978)(Affirmed on remand for resentencing 407 So.2d 892 (Fla. 1981).

Most recently the Florida Supreme Court in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981)(Certiorari denied ___U.S. ___, 102 S.Ct.542 (1981) stated:

> Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected [Tedder v. State, 322 So.2d 908 (Fla. 1975)], and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

The court noted that their role is neither more or less, but precisely the same as that employed by this Court in its review of capital punishment cases.

The Florida Supreme Court has not exhibited a recent change in its sentence review function. The sentence review function does not involve the weighing of the evidence to establish aggravating and mitigating circumstances but rather to determine whether there was sufficient evidence in the record from which the judge and jury could properly find the presence

of aggravating and mitigating circumstances. Once the court has determined that there was sufficient evidence to support the aggravating and mitigating circumstances that were found, the court must only make a reasoned review of the aggravating and mitigating circumstances to determine whether the death penalty is warranted.

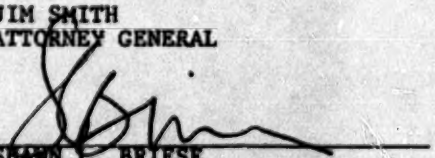
The reviewing and reweighing evidence of aggravating and mitigating circumstances as stated in Proffitt v. Florida, supra, refers to this reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the aggravating and mitigating circumstances present. The Florida Supreme Court, in the present case, has not deviated from the requirements of Proffitt v. Florida, supra, but in fact has fully complied with its requirements. The Florida Supreme Court's affirmance of the Petitioner's sentence thus does not violate U.S. Const. amend. VIII, XIV, §1.

CONCLUSION

Based upon the foregoing cases, authorities, and arguments herein, the Petition should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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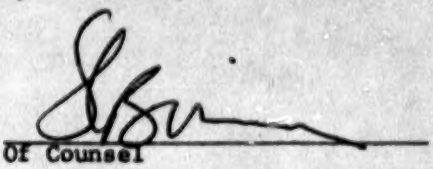
CERTIFICATE OF SERVICE

I, SHAWN L. BRIESE, Counsel for the State of Florida, the Respondent, hereby certify that on August 18th, 1982, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Response to Petition for Writ of Certiorari with attached appendix on Kenneth Darcell Quince, the

Petitioner, by depositing said copy in a United States Mail Box, with first class postage prepaid, properly addressed to Ronald K. Zimmett, Esquire; Chief Assistant Public Defender; 1012 South Ridgewood Avenue; Daytona Beach, Florida 32014-6183.



Of Counsel